KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 60**

Date: **2026 03 17**
Docket: QBG-SA-00565-2020
Judicial Centre: Saskatoon

BETWEEN:

PEACEFUL SKY HOLDINGS INC.

PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

- and -

LUBE STOP SYSTEMS INC. and RICARDO MARCIL

DEFENDANTS/
PLAINTIFFS BY COUNTERCLAIM

Counsel:

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JUDGMENT FOLLOWING TRIAL — GERECKE J.
March 17, 2026

"This ain't my first rodeo":
paraphrase of a line spoken by the Joan Crawford character in the movie *Mommie Dearest*

A. INTRODUCTION

[1] Joan Crawford insisted in *Mommie Dearest* that it was not her "first rodeo". For each of the plaintiff and defendants here, it was in fact their first rodeo.

[2] For the franchisor and its principal, this was to be their first startup franchisee, in a new community, rolling out significant new lines of business. For the franchisee, everything was new – the business model, the community, the industry, perhaps even owning a business.

[3] Many assume that becoming a franchisee involves tight controls, standardized processes, and the benefits of a larger network that provides strong marketing and favourable supply pricing.

[4] That is not the picture painted by the evidence in this case. Rather, a virtually neophyte franchisor placed a new franchise into a new market in which it had no experience and few established relationships. The franchisor had limited experience in some of the new business lines and none in others.

[5] It appears to the Court that the franchisor had only one potential franchisee, the principal of which was a relatively new immigrant to Canada with capital to invest. The franchisee did not actually want to operate a franchise. Instead, they wanted a passive investment with a landlord role. When that hope evaporated, they agreed to take on the franchisee role in the hopes of large returns but conducted little or no due diligence. Once the store opened, they expended minimal personal effort into the business apart from bookkeeping.

[6] Had the franchisor been prudent, it would not have entered into this arrangement with this franchisee. From the outset it was obvious that the franchisee was ill-prepared to operate the store in question. Nor was there any indication that the franchisee would attempt to overcome that lack of preparation through hard work.

[7] The inverse is true as well: had the franchisee been prudent, it would not have entered into this arrangement with this franchisor. Perhaps the franchisee would have been deterred if provided with sufficient disclosure of the risks to permit informed

decision-making about the venture.

[8] It is also unclear whether the franchisor gave much consideration to what risks existed in order to provide such disclosure.

[9] It did not work out for the franchisor, nor for the franchisee.

[10] The franchisor here was Lube Stop Systems Inc. [LSSI]. Its principal was Ricardo Marcil [Ricardo]. They are the defendants.

[11] The plaintiff, Peaceful Sky Holdings Inc. [Peaceful Sky], was the intended franchisee. Its principal was Michael Tang [Michael] (Michael is his anglicized name.) Michael's wife, Fan Zhang [Fan], was also heavily involved. She handled the bookkeeping.

[12] Fan already worked as an accountant with HNG Accounting Group Inc. [HNG], in Saskatoon, Saskatchewan. Lorne Horning was the lead accountant there. Fan worked regularly with Mr. Horning, who had had been LSSI's accountant for many years when these events began in 2017.

[13] LSSI owned Lube Stop quick-oil-change shops in Sylvan Lake and Lacombe, Alberta—both small communities. These stores focused entirely or largely on fluid changes and related automotive services, the core of LSSI's business.

[14] At the start of 2017, there was one Lube Stop franchise store. It was located in Saskatoon. That was LSSI's and Ricardo's only previous attempt at franchising. It had not opened as a franchise, nor was the franchisee new to the industry; it joined LSSI while already operating under the experienced management of Ed Wiebe.

[15] In early 2017, Ricardo learned of a former tire shop for sale in Humboldt, Saskatchewan. LSSI used 102019029 Saskatchewan Ltd. [029 Sask] to purchase the property in March 2017. 029 Sask leased the land to LSSI, which intended to sublease

it to the franchisee. Unlike LSSI, 029 Sask was jointly owned by Ricardo and Ed Wiebe.

[16] Peaceful Sky was to operate a Lube Stop store on the Humboldt property purchased by 029 Sask. When Michael appeared to hesitate to sign the franchise agreement and sublease, Ricardo asked Mr. Horning to sign them for Peaceful Sky. No officer or director of Peaceful Sky ever signed either agreement. Michael did not learn of their execution for six months. Nonetheless, the development, preparation, and eventual opening of the store proceeded.

[17] The Humboldt Lube Stop store opened in January 2018, months behind schedule. It failed, generating sales far below the projections contained in proforma financial statements that LSSI shared with Peaceful Sky in April 2017. Within a year, Peaceful Sky walked away from the store. LSSI (through a corporation) operated it thereafter but also enjoyed little success during the first year.

[18] Peaceful Sky commenced this action in 2020, claiming rescission of the franchise agreement and sublease because it never signed them. It also claims return of its entire investment and recovery of all its operating losses. Its claims rest on negligent misrepresentation and breach of the duty of good faith that courts have held a franchisor owes to a franchisee. Peaceful Sky brings the same claims against Ricardo personally.

[19] LSSI's defence relies on the franchise agreement and sublease that it says Peaceful Sky entered into. LSSI advances several alternative arguments: that Mr. Horning signed on Peaceful Sky's behalf; that he had ostensible authority; that there was *consensus ad idem*; or that Peaceful Sky acquiesced to the terms of those agreements. LSSI also relies on exclusion clauses present in various agreements and contends that Peaceful Sky did not reasonably rely on LSSI's representations.

[20] Peaceful Sky further claims against LSSI and Ricardo for conversion, arising from the end of the relationship when Peaceful Sky ceased operating the store and handed it to LSSI.

[21] LSSI counterclaims against Peaceful Sky for damages for breach of contract.

[22] The parties raised many issues in this trial. These include whether the defendants made misrepresentations to the plaintiff before entering into a franchise arrangement; whether the parties entered into binding agreements and, if so, what their terms were. Other disputes relate to construction costs, the ordering of initial parts inventory, accounting for and payment of invoices (which were never fully reconciled), and the hand back of the store to the franchisor. Virtually every aspect of the parties' relationship is in dispute, including trivial matters. The trial even featured evidence about an invoice for under $10. Despite the Court's urging, the parties were largely unable to narrow the issues. As a result, the damages claims involve many minor disputes.

[23] For the reasons that follow, I find that the parties never entered into a franchise agreement or sublease. Neither such alleged agreement is enforceable. However, Peaceful Sky's claim fails because it has not proven that either LSSI or Ricardo is liable. The majority of LSSI's counterclaim also fails.

[24] To better organize this judgment, I have divided it into the following sections:

B. PROCEDURAL MATTERS AND USE OF CERTAIN TERMS

[25] The parties agreed to an agreed statement of facts [Statement of Facts] that the Court found helpful. As well, they agreed to a Joint Exhibit Book [Joint Book], and that all documents in the Joint Book would be full exhibits even if not referred to. Well into the trial, the parties agreed to a supplementary agreed statement of facts [Supplementary Facts], largely for the purpose of better organizing documents relevant

to certain aspects of the claims in this action.

[26] At times in this judgment, I will refer to LSSI as the franchisor and Peaceful Sky as the franchisee. Indeed, I do so above. Peaceful Sky has pleaded that the franchise agreement was never executed and should be rescinded, which could mean that no franchise relationship ever existed even though Peaceful Sky operated for a year under the belief that it did so as a franchisee. It is for convenience and a sort of clarity that I use the terms franchisor and franchisee; such usage is not to suggest that the parties entered into such roles at law.

[27] In this judgment I frequently refer to the [Franchise Agreement] and [Sublease]. Below, I determine that the parties made no franchise agreement or sublease. I have chosen to utilize these terms for efficiency. That usage does not connote that the parties actually entered into such agreements and should not be read as such.

C. CAST OF CHARACTERS

[28] Following are the primary actors in this dispute. Where a witness's credibility and reliability can be addressed briefly, I do so here. Lengthier credibility and reliability discussions concerning Ricardo, Michael, and Fan appear in a separate section below.

1. Ricardo Marcil and Lube Stop's origins

[29] Ricardo owned and operated the defendant LSSI. He is a true self-made entrepreneur. He did not graduate from high school but has worked in the automotive aftermarket industry for over 35 years. At some point he became a partner in an independent oil change store in Lacombe, Alberta. It was a two-bay shop. In 2010, Ricardo originated the Lube Stop brand and rebranded the Lacombe store as a Lube Stop.

[30] The second Lube Stop was established in Sylvan Lake, Alberta. That store had been a Mobil1 shop that was owned by Ed Wiebe. Ricardo acquired it and converted it to a Lube Stop.

[31] LSSI later became franchisor of a Saskatoon Lube Stop store. Ed Wiebe was the franchisee. The evidence was unclear as to exactly how it came to be a Lube Stop store, but it was the first Lube Stop franchise and the only one prior to the Humboldt store. It was already an oil change operation before adopting the Lube Stop branding.

[32] Ed Wiebe and Ricardo jointly owned 029 Sask, which purchased the land and building in Humboldt. At trial, Ricardo spoke of the landlord role (including obtaining financing and paying for redeveloping the building into a Lube Stop store) as if it were all him, though it appears to the Court that Mr. Wiebe still held an interest by about the time the trial opened.

2. Michael and Fan

[33] Michael was 38 years old at the time of trial. He immigrated to Canada from China in 2009. He and his parents were involved in setting up the plaintiff corporation and he was effectively the principal of the plaintiff. English is his second language – his first is Mandarin. Michael attended the University of Saskatchewan from 2010 to 2012, earning a master's degree in public administration. While living in China he obtained an undergraduate degree in tourism. He had no experience in the automotive service industry, and no business experience in Canada.

[34] Michael did not start out wanting to buy into a Lube Stop or any franchise. He sought a profitable passive investment. However, Ricardo told him that he had no such opportunity available because Ricardo had already determined that 029 Sask would be the landlord for the Humboldt store.

[35] Michael was unwilling or unable to be personally involved in the day-to-day business operations of the Humboldt store, though he never explained why. Ricardo understood that Michael would not be involved in operations and that a manager would be needed.

[36] Michael and Fan conducted little or no due diligence into the franchise opportunity. They did not obtain legal advice. They obtained no independent accounting advice. Essentially, they saw dollar signs and chased them. While Michael and Fan preferred to invest passively, Ricardo showed them proformas prepared by Mr. Horning that suggested higher returns for a franchise operator than likely they would enjoy as passive investors. They also formed the view that Ricardo had considerable industry experience. The combination of those two factors largely sold Michael and Fan on the opportunity. In examination-in-chief, Michael described the proformas as the most important document. He treated the proformas as projections they could rely on: “Based on the proformas, I think the returns should be very good.” He testified that neither Ricardo nor Mr. Horning expressed caution about the projected revenues and profits. Instead, he relied on the knowledge and experience of Ricardo and Mr. Horning, concluding that he could trust them. Later, perhaps in June 2017, Michael received another proforma from Ricardo. It no longer bore a “Draft” watermark. According to Michael, that gave him increased confidence because it meant “It’s official”.

[37] Michael and Fan did not investigate the Humboldt market themselves. They had no experience in running a business in a smaller Saskatchewan community. They did not inquire as to what competition existed in the market. They did not ask questions about Ricardo’s experience as a franchisor, or whether his experience in the industry extended beyond oil changes to tires, to providing other mechanical services to cars, or to servicing larger vehicles, including agricultural implements.

3. Lorne Horning

[38] Lorne Horning was Ricardo's longtime accountant. He also was Fan's employer – she worked at Mr. Horning's accounting firm, HNG Accounting Group Inc. Mr. Horning prepared the proforma financial statements that Ricardo shared with Michael and Fan. It was Mr. Horning who signed the Franchise Agreement and Sublease when Ricardo lost patience because Michael was not attending to execution of those agreements. Mr. Horning testified. I found him to be a credible witness who did not appear to slant his evidence in favour of either party. Because of that, I preferred Mr. Horning's testimony where it was in conflict with that of other witnesses.

4. Supporting Cast

[39] Lambert Stromberg was a peripheral character, though he played a significant early role behind the scenes. He resided in Humboldt. He had managed the former tire shop that became the home of the Humboldt Lube Stop. That tire shop had relocated within Humboldt.

[40] Mr. Stromberg, who did not testify, factored in events in two ways. First, he prepared the document that formed Ricardo's concept for the Humboldt Lube Stop and its expanded lines of business. Second, Ricardo considered Mr. Stromberg the ideal manager for the Humboldt Lube Stop. He recommended to Michael that Peaceful Sky hire Mr. Stromberg for that role. As I relate below, Mr. Stromberg did not end up taking that position, which Ricardo considered a major error on Michael's part.

[41] After Mr. Stromberg ceased to be an option to manage the Humboldt store, Ricardo was initially flummoxed about how to make the Humboldt concept work. Michael and Fan showed no ability to locate a competent manager, and building renovations were well underway. In desperation, Ricardo presented Michael the option of having Nick Custance manage the Humboldt store. At the time, Mr. Custance

managed the Lacombe Lube Stop, which could be described as an ordinary Lube Stop outlet. He had worked for Ricardo since 2013, having worked his way up from a lesser role. Lacombe's primary offerings were oil changes, minor mechanical services (other fluid changes and wiper blades). In 2015 the Lacombe store began repairing tires, but that was never a major part of its business.

[42] Michael and Mr. Custance were able to reach agreement on employment terms (which were developed by Ricardo), and Mr. Custance became the manager of the Humboldt store as of September 1, 2017. Mr. Custance had never opened a new Lube Stop, so much learning lay ahead for him.

[43] Mr. Custance testified in a straightforward, clear and honest manner. Where his testimony conflicts with that of any witness other than Mr. Horning, I generally prefer Mr. Custance's account.

[44] LSSI employed Carrie Travis as its controller, dealing with all its stores. Ms. Travis is Ricardo's daughter. She testified at trial. She had obtained much less education in accounting than Fan. The evidence given by Ms. Travis and Fan was frequently at odds. In some cases, those differences are resolved by documentation. I generally found Fan to be a more reliable witness than Ms. Travis, but not on all points.

D. CREDIBILITY AND RELIABILITY OF THE LEADING ACTORS: MICHAEL, FAN AND RICARDO

[45] I reject much of Michael's testimony that was not confirmed by other witnesses. Not only was his memory poor, but on many subjects I did not consider him to be a credible witness.

[46] I will highlight some examples of testimony that cause me to question Michael's credibility and reliability.

[47] Michael testified to never signing the Franchise Agreement or the

Sublease concerning the Humboldt store. I accept that evidence. As I explain below, the Franchise Agreement and Sublease were signed by Mr. Horning, who dated them June 20, 2017. Michael testified that he did not know Mr. Horning had signed, and that he never authorized Mr. Horning to sign.

[48] Michael testified that he received those signed agreements for the first time in about December 2017 but recalled little else about that. He could not recall exactly when he received them, nor the surrounding circumstances. By then the original opening date had been missed by several months, but the buildout was not only underway but nearing completion. He could not recall discussing with Ricardo that he had not signed or authorized execution. He could not recall whether he received the Franchise Agreement, head lease (between 029 Sask as lessor and LSSI as lessee) and Sublease together in December 2017. He remembered only that he asked some questions about having signed the Sublease. How could he remember so little of something that he now says was highly concerning? Either his memory is genuinely poor, or he deliberately avoided answering the questions (which were posed multiple times).

[49] Michael is well-educated. In China he earned a bachelor's degree in tourism. He earned a master's degree in public administration at the University of Saskatchewan. Those studies involved some business courses. At times he alluded to business experience in China without saying more. He had some recent education that should have assisted him here.

[50] For some, lack of specific experience would prompt an individual pursuing a new venture about which they knew nothing to review documents carefully, learn about the industry, and consult with professional advisors. Michael took a very different approach than that. Rather than perform anything beyond cursory investigations himself, or engaging experienced professionals, he relied largely on his

impressions of Ricardo's expertise and experience.

[51] Although there were exceptions, Michael had little or no recall of significant events or discussions. When asked whether Mr. Horning or Ricardo provided him with cautions about the franchise opportunity, he answered "I don't think so, no". He gave the same response to questions about whether Ricardo told him the store would need a licenced mechanic on staff to carry out work beyond oil changes and tires, and as to whether Ricardo ever set Peaceful Sky up with a licensed mechanic for that purpose. His involvement was *that* limited, and his recall that poor.

[52] At times, Michael simply failed repeatedly to answer questions that were put to him. For example, he was asked twice in short order during examination-in-chief why his friend Haibo Tang was a signatory on the franchise application. Neither response came close to answering that question.

[53] Many other times, particularly as counsel guided him through the text messages at tab 2 of the Joint Book (Exhibit J-2), it was apparent that his answers were little more than speculation prompted by the context established by such messages, though he never or rarely admitted to speculating. Because of that, I have little confidence of his actual recall in respect of portions of his testimony.

[54] At trial, Michael said that his lack of expressions of concern (in the early stages of the transaction) were attributable to differences between eastern and western cultures and how eastern cultures approach the expression of feelings. As Michael explained it, saying that you have questions means that you have concerns or are hesitant, while a lack of questions means everything is all good. He acknowledged never explaining that to Ricardo or anyone else involved. However, Michael barely even asked questions of Ricardo, so Michael's suggestion that he was subtly expressing concerns in a manner consistent with his culture is not supported by the evidence. It smacks of an after-the-fact attempt by Michael to argue that he should not be held

responsible for his barely cursory investigations of the transaction. Moreover, even that evidence was often internally inconsistent. Michael stated more than once that the revenue numbers in the proformas were not properly explained because "no one told us it's just simple math", but then he acknowledged that he knew exactly how the calculations worked.

[55] At best, Michael entered the transaction just assuming everything would work out well because Mr. Horning told him Ricardo was knowledgeable and Michael believed Ricardo had opened stores in many places (actually, it was about three new stores). At worst, Michael deliberately chose not to ask questions and later fabricated the explanation about cultural differences.

[56] My assessment of Michael as a witness can be distilled to the following: either he was as uninterested and disengaged as he suggests, in which case much of his evidence was unreliable because his memory was so poor, or he was more knowledgeable and canny than he acknowledges, in which case I would conclude that much of his evidence was not credible. I am not sure which is true. Some evidence suggests the former, such as the repeated changes he made to the Corporate Registry to reflect changes in directors and shareholders when no shares were ever issued, no meetings held, and no resolutions passed. If I take his evidence on that at face value, I must conclude that he knew nothing more than how to access the registry online and make changes to Peaceful Sky's profile.

[57] At other times, it was difficult to determine whether Michael avoided answering questions out of ignorance or not listening carefully to the question (the latter was certainly true at times), or evasiveness. There were times when I concluded he was deliberately evasive, but not throughout.

[58] The issues with Michael's credibility and reliability probably source in part to all the foregoing factors in combination, including poor memory, evidence

shaped to be self-serving, evasiveness, and lack of engagement at the time of the relevant events. The upshot is that except for limited occasions, I do not accept Michael's testimony where it conflicts with other evidence at trial.

[59] Now I turn to Fan's credibility and reliability. I found most of her evidence to be credible. She generally attempted to answer questions in a straightforward and direct manner. Her evidence of her efforts to try to reconcile LSSI's records about invoices and determine what was owed to whom was highly detailed and appeared to me to contain very few errors. Mr. Horning testified during cross-examination (he was Peaceful Sky's witness) that he considered Fan to be a very capable accountant with an eye for detail. My impression aligned with Mr. Horning's except that it appeared to me that Fan's experience was limited mainly to bookkeeping, including assembly and reconciliation of records and ledgers. She had received education in all aspects of accounting, but at trial she showed little knowledge of more advanced accounting tasks and principles.

[60] I consider Fan's evidence to have been generally reliable with some exceptions. First, there were times that it appeared to me that Fan would assert a position, such as concerning what she and Michael were prepared to agree to at the outset, when she actually had little involvement in such matters. If something related to an accounting issue, I accept that she was involved. On other matters, including the overarching strategy of how to invest, she was little more than a passenger. I question the reliability of her evidence concerning those subjects.

[61] I also question Fan's evidence regarding the hand back of the Humboldt store to LSSI. Her testimony about what Ricardo promised at that point strains credulity to the breaking point. I discuss that below in my discussion of those events.

[62] Ricardo was prone to bluster, overstatement, and hyperbole. As an example, he would try to characterize things he had never done before as "practices".

He claimed to draft the application form for all interested parties, though he only had one prior franchisee and had never before started a new store with one. He similarly claimed that his "practice" was to not release the franchise agreement to a prospective franchisee until they signed his application and confidentiality agreement and paid certain funds, but there was no evidence of him ever being in such a situation (at least concerning a new store) with any prior applicant. He offered no narrative of how Mr. Wiebe came to be his franchisee.

[63] He accepted no responsibility for anything that did not go well, deflecting that on others. For example, he blamed the contractor for why construction of the new store took so long, rather than accepting any fault for accepting time estimates that proved extremely unrealistic. When the project cost more than expected, Ricardo accepted no responsibility.

[64] Ricardo accepted no responsibility for the problems created by trying to make this the biggest Lube Stop operation by far, with new and unfamiliar lines of business, all with a neophyte franchisee who knew nothing about the industry and did not care to learn.

[65] Ricardo also accepted no responsibility for his failure to properly evaluate Peaceful Sky as a prospective franchisee. On that front it appears that he was unable to resist the money he believed Michael brought to the table. At the time, Ricardo was under great financial strain. Even before he had Mr. Horning sign the Franchise Agreement and Sublease, Ricardo was already running out of money. I conclude that need to address his own financial difficulties, combined with no viable alternatives (at no point did Ricardo or Mr. Horning testify to any other prospective franchisee and I am satisfied that none existed), caused Ricardo to take huge risks with Peaceful Sky. Peaceful Sky's unsuitability should have been glaringly obvious, but Ricardo raced ahead because he had left himself with no alternatives. I generally do not accept

Ricardo's evidence that intersected with LSSI's financial weakness for that reason.

[66] Ricardo also appeared to me to know little about being a franchisor. Absent from his testimony was anything to explain how he learned (if he did learn) about what would make a successful franchise brand. His only prior franchise store was Saskatoon, owned by Ed Wiebe. Ricardo and Mr. Wiebe had worked together before, and Mr. Wiebe was experienced in the industry. A new franchisee with no such experience would be a much greater challenge for the franchisor. Not once in his extensive testimony did Ricardo display any understanding of that challenge and why it would be a terrible idea to combine that new and disinterested franchisee, an inexperienced franchisor, multiple new lines of business requiring greater investment, and a new market with little or no local knowledge (particularly once Mr. Stromberg was no longer an option). He accepted no responsibility for his failure to recognize and tackle those problems.

[67] Ricardo spent vast time with Mr. Custance entering new codes into his systems to accommodate the new business lines. Ricardo again displayed no understanding of how the time he spent on that detracted from his ability to ensure that his new franchisee would be fully aware of how to succeed.

[68] On those business issues, it is unclear to me whether Ricardo lacked insight into the challenges, was wilfully blind to them, or knew the risks and recklessly decided to take them anyway. Ultimately it matters little which of those is true. But the upshot is that I largely do not trust Ricardo to have given consistently truthful and reliable testimony as to why things happened or even what happened, unless his evidence has been corroborated.

[69] I also generally do not accept Ricardo's evidence concerning compliance with formalities unless corroborated. For example, he was asked whether LSSI served written notice of breach under clause 15(1)(c) of the Franchise Agreement. He referred

to text messages where he pleaded for payment. I am skeptical about whether such messages would amount to formal notice of breach under an agreement.

[70] As to whether Ricardo provided particular details to Michael in advance of Mr. Horning signing the Franchise Agreement, I believe Michael's account over that of Ricardo. As a specific example, Ricardo testified that he provided Michael with the document prepared by Mr. Stromberg. Michael denied that. On that, and most or all similar conflicts in evidence relating to the period before Mr. Horning signed the Franchise Agreement, I believe Michael's evidence over Ricardo's.

[71] There also are points where I simply do not know which of Michael and Ricardo to believe. In those circumstances the burden of proof borne by a party becomes particularly important.

[72] Finally, on some issues I believe Ricardo's evidence on some details, and Michael's on other details. I will provide a specific example. With respect to efforts to finalize the Franchise Agreement, I do not believe Michael's assertions that Peaceful Sky expressed reservations – I accept Ricardo's evidence that Michael did not do that – but I also do not believe Ricardo's evidence that Michael told him he was ready to sign. In both cases I am more comfortable relying on the text messages that are in evidence. Those text messages support my determinations on both fronts.

E. ISSUES

[73] The following issues and sub-issues must be determined:

Issue #1: Did the parties execute the Franchise Agreement and Sublease?

Issue 1(a): Was there actual execution?

Issue 1(b): Did Mr. Horning have ostensible authority to sign the Franchise Agreement and Sublease?

Issue #2: Is there an alternate theory of contract formation that supports a finding that the parties entered into the Franchise Agreement and Sublease?

Issue 2(a): Were oral agreements made to govern the franchise and sublease relationships?

Issue 2(b): Did Michael and Peaceful Sky acquiesce to the terms of the Franchise Agreement and Sublease?

Issue #3: Is there a liability exclusion clause in force?

Issue #4: Does the franchise context operate to negate the availability of the "No Assurances or Obligations" clause contained in the Confidentiality Agreement?

Issue #5: Is LSSI liable to Peaceful Sky in conversion?

Issue #6: Is Ricardo liable in his personal capacity?

Issue #7: Is Peaceful Sky liable to LSSI concerning rent arrears?

Issue #8: Is Peaceful Sky liable to LSSI concerning arrears of payments for inventory?

Issue #9: Is Peaceful Sky liable to LSSI concerning leasehold improvements and building expenses?

Issue #10: Is Peaceful Sky liable to LSSI for advertising and marketing expenses?

Issue #11: Is Peaceful Sky liable to LSSI for operational system expenses?

Issue #12: Is Peaceful Sky liable to LSSI for training expenses?

F. ANALYSIS CONCERNING PEACEFUL SKY'S CLAIM

[74] Peaceful Sky seeks judgment against LSSI for the full amount of its investment in the Humboldt Lube Stop store, including all operating losses. It has not proven entitlement to any of that, and I need not calculate its damages.

[75] To begin, Peaceful Sky seeks a declaration that the Franchise Agreement and Sublease are void and of no force and effect. It asks for that in order to nullify the effect of potential liability exclusion clauses, particularly the "Entire Agreement" clause in the Franchise Agreement. Below I find that the "Entire Agreement" clause is not available to protect LSSI, but that the "No Assurances or Obligations" clause contained in the Confidentiality Agreement does protect it from liability. Because of that, Peaceful Sky cannot succeed on its claim to recover its investment.

[76] In a later section of this judgment, I analyse Peaceful Sky's claim in conversion. That claim fails because I determine below that no conversion occurred.

[77] I begin with some factual background relevant to whether the parties made agreements.

Factual background and findings

[78] Following is an approximate high-level timeline relating to the purported execution of the Franchise Agreement and Sublease:

Date	Description
About April 10, 2017	Michael and Ricardo first met
April 20, 2017	Ricardo texts Michael to explain that he needed a final decision on whether Michael would get involved with the Humboldt store
April 20, 2017	Ricardo provided Michael with a copy of the draft franchise agreement
April 26, 2017	Michael and Haibo Tang executed the confidentiality agreement and the franchise application and handed Ricardo a cheque for $50,000 [Deposit], as a deposit pursuant to the franchise application. Ricardo also provided Michael with printed copies of the

	Franchise Agreement, Sublease and head lease. The Deposit was placed in trust with LSSI's solicitors, Gall Law Office.
May 15, 2017	Ricardo advises Michael by text that he would be signing the Franchise Agreement. Michael responds that "it's better to get the final price at first" following which they could sit together to discuss the detailed plan.
May 20, 2017	Michael texts Ricardo: "Hi, met Lorne and he will sign the paper to release the 50000", which referred to the Deposit. Ricardo responds with thanks and writes: "Thanks Michael I believe the timer is off".
June 20, 2017	Ricardo and Michael had made plans to get together on June 21, 2017. The purpose was to discuss the agreements. Ricardo expected that in that meeting – planned to be at Mr. Horning's office – the Franchise Agreement and Sublease would be executed fully. On June 20, Ricardo cancelled that meeting because of property damage at home from a storm. That day, probably out of desperation because he was short of money and his mortgage lender was asking for signed agreements, Ricardo asked Mr. Horning to sign the Franchise Agreement and Sublease, which he did.

[79] Mr. Horning testified that Michael specifically authorized him to sign the document to release the $50,000 Deposit referred to in the May 20, 2017 text that I reference above.

[80] On the other hand, Mr. Horning stated he was not specifically authorized by Michael to sign the two agreements. He signed because Ricardo called him, saying that he needed them signed to get funds released from his financing for the construction

work on the Humboldt property. Ricardo told him that Michael had approved both agreements. Mr. Horning "thought nothing of it", signed the two signature pages and sent them to Ricardo's lawyer, Rod Gall.

[81] Michael had not communicated to Ricardo that he was satisfied with the Franchise Agreement and Sublease. He also had not openly expressed disagreement with them. When Michael was asked during examination-in-chief whether he discussed those documents with Ricardo, he essentially avoided the question, responding just that he never agreed to sign them. At no point did Michael testify to communicating to Ricardo any objections concerning their terms. I find that Michael never did so. He never communicated agreement or concerns.

[82] Mr. Horning testified that he saw and signed only signature pages on June 20, 2017. He was confident of that because his normal practice is to initial all pages of an agreement where he signs, having had bad experiences in the past where uninitialed pages were later changed. The other pages of the Franchise Agreement and Sublease did not bear his initials.

[83] Mr. Horning also testified more broadly about his practice of signing documents for Peaceful Sky. Michael frequently travelled to China so he asked Mr. Horning if he could serve as a director for a period while Michael got things organized. Mr. Horning agreed. The date on which they agreed to that is not in evidence, but I am satisfied that it preceded May 20, 2017, when, with Michael's express approval, Mr. Horning signed the document to release the $50,000 Deposit. At no point did Mr. Horning sign a written consent to serve as a director, though he testified that he told Michael he would. Nor was any meeting of shareholders ever held, nor was a formal resolution of Peaceful Sky shareholders ever passed to appoint Mr. Horning as a director.

[84] On June 20, 2017, Mr. Horning was the accountant for LSSI. He did not

cease working in that role until 2018 or 2019.

[85] I find the foregoing as fact.

[86] Now I turn to the analysis of whether the parties executed the Franchise Agreement and Sublease, which is Issue #1. I deal later with LSSI's alternate theories of creation of binding agreements under the head of Issue #2.

Issue #1: Did the parties execute the Franchise Agreement and Sublease?

[87] The answer to this question is no. For the following reasons, I conclude that actual execution did not occur. Nor was Mr. Horning cloaked with ostensible authority to sign on behalf of Peaceful Sky.

Issue 1(a): Was there actual execution?

[88] The evidence at trial was uncontroverted that Mr. Horning signed the Franchise Agreement and Sublease. Michael never signed those agreements.

[89] Mr. Horning signed them because Ricardo told him that Michael had signed off on the Franchise Agreement and Sublease. Mr. Horning accepted that representation and signed the Franchise Agreement and Sublease. He only saw and signed signature pages, not complete agreements. He testified that he signed them only because on occasion he would sign documents on behalf of Peaceful Sky. He understood that he had no authority to approve those agreements for Peaceful Sky.

[90] Peaceful Sky contends that Mr. Horning signed the agreements without authority. It contends that LSSI knew or ought to have known that Peaceful Sky was not ready to sign those agreements and had reservations about them. Further, Peaceful Sky argues that Mr. Horning had no authority to sign them, and that none of the concepts of agency or ostensible authority assists LSSI.

[91] No one testified that they had actual knowledge of Michael having expressly authorized Mr. Horning to sign the Franchise Agreement and Sublease. I am satisfied that Mr. Horning did not have actual authority to do so. Rather, he relied on Ricardo's representation that Michael had approved those agreements.

[92] There was no evidence of Michael or Peaceful Sky consulting Mr. Horning concerning agreement terms. To the extent that they consulted with Mr. Horning, it was to discuss the projections in the proformas.

[93] The uncontroverted evidence was that no one with actual authority to bind Peaceful Sky executed the Franchise Agreement or Sublease at any point. Ricardo said he believed there was actual authority, but he had no personal knowledge of that.

[94] I therefore find that no one with actual authority executed the Franchise Agreement or Sublease.

Issue 1(b): Did Mr. Horning have ostensible authority to sign the Franchise Agreement and Sublease?

[95] The answer to this question is no: Mr. Horning did not have ostensible authority.

[96] Above I determined as fact that Mr. Horning did not have actual authority to bind Peaceful Sky with respect to either the Franchise Agreement or Sublease. That logically leads to the question of whether he had ostensible authority.

[97] LSSI argues that as Peaceful Sky's agent Mr. Horning had ostensible authority to execute the Sublease and the Franchise Agreement. It relies primarily on *Toronto-Dominion Bank (TD Canada Trust) v Currie*, 2017 ABCA 45 [*Currie*], which I discuss below.

[98] The principles underpinning ostensible authority were summarized by the

Court of Appeal in *Seven Oaks Manufacturing and Sales (1968) Ltd. v Vaughan*, 1977 CanLII 1456, [1977] 4 WWR 119 (SKCA), as follows:

> [7] The law is that, where a person has, by words or conduct, held out to another person or enabled another person to hold himself out as having authority to act on his behalf, he is bound as regards third parties by the acts of such other person to the same extent as he would have been bound if such person had, in fact, had the authority which he was held out as having.

[99] Those principles were expanded upon by the Alberta Court of Appeal in *Currie*:

> [6] When an agent acts within his or her actual authority, the principal is bound by the acts of the agent, even if fraudulent: ***Martin v National Union Fire Insurance Co.***, [1923] 3 WWR 897 at p. 904 (Alta SC App Div), affirmed ***National Union Fire Insurance Co v Martin***, [1924] SCR 348. However, where the principal alleges that the actor either (i) was never an agent or (ii) was an agent but acted outside his or her actual authority, the question becomes whether the agent had ostensible authority. The answer depends on whether the principal has, by words or deeds, held out the agent as having the authority to do the challenged act: ***Doiron v Manufacturers Life Insurance Co.***, 2003 ABCA 336 at paras. 15-6, 20 Alta LR (4th) 11, 339 AR 371.
>
> [7] The law has established a number of principles about ostensible authority of an agent:
>
> > (a) Representations about the authority of the agent must come from the principal; an agent cannot clothe himself or herself with authority: ***Jensen v South Trail Mobile Ltd.***, 1972 AltaSCAD 29 at para. 21, [1972] 5 WWR 7, 28 DLR (3d) 233;
> >
> > (b) The onus is on the person who is relying on the act of the agent to prove ostensible authority;
> >
> > (c) However, when the agent has actual authority, but that authority is subject to limitations, the onus is on the principal to prove that the limitations were conveyed to the third party who relied on the agent: ***Kohn v Devon Mortgage Ltd.***, 1985 ABCA 10 at para. 3, 37 Alta LR

> (2d) 20, 65 AR 73 (CA);
>
> (d) These general principles apply to the specific situation where a debtor pays money to the agent, rather than directly to the principal, as happened in this appeal: ***Kohn v Devon Mortgage***.
>
> Whether the test has been met in this appeal is largely a question of the proper inferences to draw from the undisputed facts. Some of the earlier cases use dramatic language to describe the evidence that is required to meet these various tests: "pays at his peril", "clear evidence of authority", "prove to the hilt", "clear and unequivocal proof", etc. There is, however, only one standard of proof in civil cases, and that is proof on a balance of probabilities: ***F.H. v McDougall***, 2008 SCC 53 at para. 40, [2008] 3 SCR 41.
>
> [Emphasis of underlining and bold in original]

[100] I conclude that *Currie* represents an accurate statement of the relevant principles governing ostensible authority, which may be summarized as follows:

a. Representations about an agent's authority must come from the principal. An agent cannot make binding representations about his or her own authority.

b. The party alleging ostensible authority bears the onus to prove its existence.

c. In contrast, where actual authority exists, the principal bears the onus of proving that limitations on that authority were communicated to the opposite party.

[101] Agency relates primarily to actual authority. As I observe above, both Michael and Mr. Horning confirmed that Mr. Horning had no actual authority to sign the two agreements and thereby bind Peaceful Sky. The question then is whether Michael held Mr. Horning out as having that authority. That onus rests on LSSI.

[102] Amendments to Peaceful Sky's corporate profile at the Corporate Registry were a curious part of the evidence at trial. They are relevant to the ostensible authority issue.

[103] Only Michael made filings at Corporate Registry for Peaceful Sky. On June 20, 2017, Mr. Horning did not appear as a director. He first appeared on June 27, 2017. On that date, Michael made several changes to Peaceful Sky's corporate profile, including adding Mr. Horning as a director. On December 12, 2017, Michael further amended Peaceful Sky's corporate profile to show that Mr. Horning held 10 Class A shares in Peaceful Sky, although no director's resolution was passed to issue shares to him and no such shares were purchased or issued. Mr. Horning denied ever holding shares; Michael denied issuing any. Subsequent notices – such as the February 25, 2019 filing – no longer listed Mr. Horning as a shareholder.

[104] It is apparent that Michael did not understand the workings and significance of the Corporate Registry or of listing someone as a director or shareholder. He made changes when he decided to and appears not to have informed individuals when he added them to Peaceful Sky's corporate profile.

[105] In any event, by June 20, 2017, Mr. Horning had never appeared on LSSI's corporate profile.

[106] The sequence of events is important. For Ricardo reasonably to conclude on June 20, 2017 that Mr. Horning possessed authority, any indicators of such authority must have been apparent to him by or before that date. LSSI cannot rely on events that occurred days, weeks and months later to establish that Mr. Horning had ostensible authority on that day. Ostensible authority requires that the principal hold out an individual as having authority, and that the counterparty rely on that. Absent such a holding out, ostensible authority cannot apply.

[107] With one significant exception, nearly all the evidence LSSI points to regarding ostensible authority postdates June 20, 2017.

[108] The one potential indicator preceding June 20, 2017 was that Mr. Horning signed the authorization to release the $50,000 Deposit to LSSI. Michael expressly authorized him to do so on Peaceful Sky's behalf, and told Ricardo he had done so in his May 20, 2017 text message. However, as I explain below concerning another issue, it is a dramatic leap for Ricardo to infer that authority to sign for release of the Deposit meant that Mr. Horning was authorized to approve and sign the Franchise Agreement and Sublease. In contrast to the text concerning the Deposit, Michael said nothing about authorizing Mr. Horning to sign the major agreements.

[109] Importantly, there was no basis for Ricardo to believe that Michael was satisfied with the Franchise Agreement and Sublease. Michael had communicated no satisfaction to Ricardo about either agreement. *It was Ricardo who told Mr. Horning that Michael was ready to agree to the Franchise Agreement and Sublease*. No one else communicated that to Mr. Horning. *What Ricardo told Mr. Horning was false: Michael had not agreed to either agreement*. I conclude that Ricardo was fully aware of that. He may not have known what was delaying execution, but he knew Michael had not agreed to them. I find as fact that Ricardo made the above representation to Mr. Horning, that it was not true, and that Ricardo knew or ought to have known that it was not true.

[110] It cannot be that ostensible authority is available when the party seeking to rely on it has misrepresented to the purported agent that the principal is fully on-board with the agreement being executed.

[111] I conclude neither Michael nor Peaceful Sky clothed Mr. Horning with ostensible authority by Michael or Peaceful Sky.

[112] I recognize that the ostensible authority doctrine does not require an

express statement by the alleged principal that the agent has authority. In appropriate circumstances, that can be determined through inferences. Nonetheless, the evidence falls far short of establishing that Mr. Horning was clothed with ostensible authority to execute the Franchise Agreement and Sublease.

[113] Accordingly, LSSI's ostensible authority argument fails. Above, I found that Mr. Horning had no actual authority to sign the two agreements. As a result, I conclude that the Franchise Agreement and Sublease were never executed by or on behalf of Peaceful Sky.

Issue #2: Is there an alternate theory of contract formation that supports a finding that the parties entered into the Franchise Agreement and Sublease?

[114] The answer to this question is no. Its determination requires consideration of several sub-issues that I will examine. The alternative theories offered by LSSI are that there was *consensus ad idem* on the terms of the Franchise Agreement and Sublease (which could lead to findings that oral agreements were made) and that Peaceful Sky acquiesced to the written terms of the Franchise Agreement and Sublease.

Factual background and findings

[115] Michael and Ricardo disagreed on whether Ricardo had previously provided Michael with drafts of the two agreements. At one point, Michael testified to never having been provided with either, but that was clearly not the case. At another time he stated that he did not recall whether he received the Franchise Agreement, Lease and Sublease at the same time.

[116] Ricardo's testimony on what agreement drafts he provided is essentially uncontroverted because Michael's evidence on the point is inconsistent and unreliable. I find that on April 26, 2017, Ricardo provided Michael with drafts of the Lease,

Sublease and Franchise Agreement in an envelope.

[117] Some preliminary explanation is necessary. Not all the operative terms of the Sublease were contained in the Sublease itself. The structure was as follows: 029 Sask owned the land and leased it to LSSI under the terms of the Lease. The Sublease then incorporated certain provisions of the Lease, including the rent payable by Peaceful Sky. Accordingly, to understand the terms of the Sublease one must also consider the Lease. Thus, when I say below that I do not know the contents of the Sublease that Ricardo gave to Michael in the envelope, that includes not knowing the terms of the Lease draft that Ricardo provided at the same time.

[118] Although the signed agreements were put into evidence, Mr. Horning saw only the signature pages for the Franchise Agreement and Sublease. He did not see the contents of those agreements, nor did he see the Lease.

[119] Following June 20, 2017, LSSI and Ricardo on the one hand, and Peaceful Sky and Michael on the other, each operated on the basis that they had entered into a binding arrangement. Something had changed in each of their minds. Following is a brief chronology of events from June 20, 2017 to September 1, 2017:

a. On June 21, 2017, Ricardo texted to Michael, “Thank you for being flexible in the past couple of days with all what has been going on in my life thank you. Also thank you for being my newest new business partners franchise I appreciate you and your family very much thank you”. Michael responded: “You are welcome, it’s just the beginning, we will work together for a long time.”

b. On June 23, 2017, Michael asked Ricardo for contact information for Lambert Stromberg, the individual that Ricardo was proposing to be hired as store manager. The two entered into discussions with

Mr. Stromberg about filling that role. Terms were negotiated with Mr. Stromberg that he accepted. According to Ricardo, Michael then went directly to Mr. Stromberg and asked him to accept significantly reduced compensation. Mr. Stromberg decided that was insulting and walked away from any involvement in the Humboldt store. I accept Ricardo's evidence on that point. I discuss the implications of losing Mr. Stromberg below.

c. Following June 20, 2017, Ricardo accelerated his investment into preparing the Humboldt property to become a Lube Stop location.

d. On July 5, 2017, Michael thanked Ricardo for all his "patience and help", suggesting that a milestone had been achieved.

e. On July 25, 2017, Ricardo provided Michael with a brief update on the progress of getting the Humboldt property ready. The two, and certain others, had dinner on July 26, 2017, and Michael gave Ricardo gifts for he and his family.

f. On August 19, 2017, Michael sent the following text to Ricardo: "Our competitors are very strong, the whole maintenance package is around 30 bucks and fast lube is everywhere", which was clearly predicated on an understanding that the parties had entered into a franchise arrangement.

g. After Mr. Stromberg backed away from any involvement with the store, Ricardo made Mr. Custance available. Peaceful Sky hired Mr. Custance to manage the store.

[120] I find the foregoing as fact.

[121] I find as fact that Michael had not communicated to Ricardo (nor anyone else) his approval of the Franchise Agreement, and that Ricardo knew that. Ricardo is unable to point to any discussion or document where Michael communicated that he was in full agreement with the Franchise Agreement. It may be that Michael was slow-playing things in hopes of concessions that he had not even asked for, but nonetheless he had not communicated to Ricardo that he was prepared to enter into either the Franchise Agreement or Sublease.

[122] All of the above steps occurred by September 1, 2017. After that date, the activity evolved and intensified into setting up the store, ordering inventory and signage, and similar steps. The store opened in January 2018, and Peaceful Sky operated it for nearly a year before handing it back to LSSI as of January 1, 2019.

[123] As I explain above, the parties' behaviour and the tone of their communications changed following June 20, 2017, consistent with what one would expect to see from parties who had made a contract to significantly alter their mutual relationship.

[124] Michael admitted in cross-examination that by the time of text messages exchanged on July 25, 2017, he understood that he (i.e., Peaceful Sky) was a franchisee.

Issue 2(a): Were oral agreements made to govern the franchise and sublease relationships?

[125] LSSI urges that the parties' conduct after June 20, 2017 must mean that they did enter into those agreements. I agree that their post-June 20 conduct was consistent with agreements having been made. One could argue that it makes no sense that the parties would work so intensively toward building the improvements, setting up the store, ordering and installing equipment and signage, ordering considerable inventory, and actually opening the store, if they did not each believe and understand that they had entered into a binding mutual agreement.

[126] Nonetheless, as the caselaw instructs, *consensus ad idem* must exist to find that an oral agreement is made. That is an objective determination, not subjective. I determine that no *consensus ad idem* was ever reached between the parties regarding the Franchise Agreement. The same is true for the Sublease, largely because the two agreements were essentially co-dependent. One could not make one without the other.

[127] Peaceful Sky offered no written submissions on the terms the parties agreed to. When I asked during oral argument about that, Peaceful Sky's counsel conceded that the Franchise Agreement in force was not materially different than the written version, but that the oral agreement was "entirely loosey-goosy", and that how the parties conducted themselves afterward was consistent with a loosey-goosy relationship. Peaceful Sky did not get more specific than that, except perhaps to suggest that Peaceful Sky conducted itself consistent with having made a passive investment.

(a) Legal framework: subsequent conduct and consensus ad idem

[128] It is possible to make oral agreements where there is agreement on all essential terms, but I find that oral agreements were not formed to govern the franchise or sublease relationships. My reasons follow.

[129] In determining whether a contract was formed, courts may consider subsequent conduct. In *Tarasoff v Tarasoff*, 2023 SKKB 102, this Court stated:

> [42] In the context of the factual matrix before the Court relating to two written "Agreements" that were drawn up during a short period of time, the decision of *Martel v Mohr*, 2011 SKQB 161, [2011] 9 WWR 150 [*Martel*], is instructive in detailing the importance of the subsequent conduct of the parties in considering the existence of a contractual relationship where they state:
>
> > 39 *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97, [1991] O.J. No. 495 (Ont. C.A.), is a leading Canadian decision on agreements to agree. It aptly sets out the issues at p. 104:

> ... when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent upon the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. ...

40 As *Bawitko* states, *there are three separate principles contained within the basic notion that an "agreement to agree" is unenforceable. The first proposition is that there is no enforceable contract where essential terms of the agreement have not been agreed to, but have been left to the parties for future agreement. The second proposition is that there is no enforceable contract where the provisions of what has been agreed to are insufficiently certain. The third proposition is there is no enforceable contract where the parties intend that a preliminary agreement is not to create binding contractual relations until a subsequent formal document is executed. In examining all of the situations, the parties' subsequent conduct is an important factor. Conduct takes on great importance in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. It is clear that the courts have a strong inclination to find a binding contract if the parties acted as if they thought they had one.* Subsequent conduct reinforcing a conclusion that there was a binding contract has been relied upon by many courts including decisions in *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (S.C.C.); *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) and *Imperial Oil Ltd. v. Young* (1998), 167 Nfld. & P.E.I.R. 280, 21 R.P.R. (3d) 65.

[Emphasis added]

[130] The Court of Appeal summarized the significance of *consensus ad idem* and its requirements in *Neigum v Van Seggelen*, 2022 SKCA 108:

> [56] As a starting proposition, I recognize that courts should be reluctant to void contracts – or settlement agreements – on the basis of uncertainty. But, as Geoff Hall notes in *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 77, the corollary is that *courts must also strive to avoid interpreting uncertainties in a way that creates an agreement the parties did not intend*:
>
> > One aspect of the rule that courts should hesitate to find a contract void for uncertainty is that they are reluctant to find a missing provision so essential that its absence renders a contract void: It is only the lack of a term that is so essential to the contract that without it the court cannot collect the real intentions of the parties from the language within the four corners of the instrument and so cannot give effect to such intentions by supplying anything necessarily to be inferred that will render the contract unenforceable.
> >
> > …
> >
> > Since contracting parties may use very imprecise language yet still intend to be legally bound, application of this principle can defeat the intentions of the parties by finding that an agreement which was intended to be enforceable is not. An interpretive rule seeks to avoid such an outcome. It directs a court to make every effort to find a meaning for a contract and avoid (if possible) finding a contract to be void for uncertainty. At the same time, the effort to find a meaning must not go so far that the effect is to have the court write a contract for the parties. Thus, the rule has two distinct elements. First, the court must be hesitant to come to the conclusion that it is not possible to ascribe any meaning to a contract. Second, while searching for a possible meaning, the court must refrain from imposing a contract upon the parties which would not accord with their actual intentions.
>
> [57] To put this succinctly, uncertainty created by the absence of an explicit term will not necessarily render a contract or settlement agreement invalid on that basis. *However, where the*

term is one that is essential to the agreement, in the sense that it is central to the parties' own understandings of what has been offered and accepted, that uncertainty means there is a failure of consensus ad idem and, as such, no enforceable contract or agreement. In *Mosten Investments LP v The Manufacturers Life Insurance Co. (Manulife Financial)*, 2021 SKCA 36, [2021] 9 WWR 1, this concept was described in the following way:

> [67] There can be no enforceable contract without *consensus ad idem*. The concept it expresses underpins the fundamental requirements of contract formation, namely, offer, acceptance, consideration and communication. It holds that every party to an enforceable contract must have the same understanding as to the content of each of its fundamental requirements. For an enforceable contract to come into existence, the parties must reach *consensus ad idem* as to what has been offered and accepted and as to the consideration therefor. This can only occur where those promises have been communicated to, and understood by, all of the parties. *Consensus ad idem* is essential to contract formation and enforcement and it is, therefore, the object of contract interpretation.

[58] *As the jurisprudence instructs, in order to properly find that consensus ad idem exists, a court must be able to determine there was a meeting of the minds that was "manifest to the reasonable observer" and that this consensus existed with respect to "all the essential terms of the agreement", and that those essential terms are sufficiently certain* (*Tether* [2008 SKCA 126] at para 62; *Anderson* [2021 SKCA 117] at para 72; *Jans Estate* [2020 SKCA 61] at para 34).

…

[62] Of course, *issues of contract formation, like issues of contract interpretation, do not turn on the subjective intentions of the contracting parties; the question is whether an objective reasonable observer would conclude that the parties had entered into a binding agreement that encompassed all of the essential terms.* As such, the determination of whether the Chambers judge erred in this case by finding the settlement agreement to be enforceable turns on whether the term respecting who would be responsible for the tax consequences arising from the equipment sale proceeds was an essential term

> of the agreement, such that this lack of consensus would cause an objective reasonable observer to conclude that a true agreement had not been achieved.
>
> [63] I return to the grounding principle that, *in order for a binding and enforceable agreement to arise, the parties must agree on the essential terms. Generally speaking, a document that omits essential terms, or contains vague or incomplete material terms, will not constitute an enforceable contract* (or settlement agreement) (see: *Consulate Ventures Inc. v Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324 at para 81, 282 DLR (4th) 697, leave to appeal to SCC refused, 2007 CanLII 45678). However, *for a contract or settlement agreement to fail on the ground that it has omitted a term, the term must be so essential to the agreement that, without it, the court "cannot collect the real intentions of the parties from the language within the four corners of the instrument"* (*Kennett v Diarno Farms*, 2018 SKQB 179 at para 73, quoting from *First City Investments Ltd. v Fraser Arms Hotel Ltd.* (1999), 104 DLR (3d) 617 at para 31 (BCCA)).
>
> [Emphasis added]

(b) State of the written versions

[131] I turn now to the state of the written versions of the Franchise Agreement and Sublease.

[132] Ricardo testified that the "final" version of the Franchise Agreement was the same as what Mr. Horning signed. Ricardo claimed in examination-in-chief that Mr. Horning removed attachments to it – the certificate of solicitor and Schedule A. Mr. Horning testified that all he received was signature pages.

[133] I accept Mr. Horning's testimony on that point and reject that of Ricardo. As I observed above, Mr. Horning testified credibly and reliably. On the other hand, Ricardo's evidence on the contents of the drafts was closely related to his evidence that Michael told him he was good with the agreements, which I already rejected above. Ricardo's testimony in this area was generally not credible. The Court heard no other

evidence that anyone removed those attachments, nor that anyone was asked to remove them. Ricardo's suggestion was that Mr. Horning removed them but there is no reason why he would.

[134] I find that Michael never saw a version of the Franchise Agreement identical to what Mr. Horning executed (keeping in mind that Mr. Horning did not see it either, only the signature pages). The draft that Ricardo provided to Michael is located at tab 1 of the Joint Book (Exhibit J-2).

(c) The parties did not agree on all essential terms of the key agreements

[135] As I discuss above, the key factor in determining whether the parties made an agreement is whether they arrived at *consensus ad idem* with respect to all essential terms. I find that did not occur here. The following paragraphs identify the specific essential terms on which there was not agreement.

[136] Regarding the Franchise Agreement, there was no agreement on the scope of business to be carried out at the Humboldt store. That scope shifted more than once. At times the store was to engage in just oil changes and tire sales. However, Ricardo later (but before June 20, 2017) added servicing of larger vehicles and servicing offsite through a service truck. Those concepts were Mr. Stromberg's brainchild. At no point did Peaceful Sky agree to that scope. Michael testified that it was not until late 2017 that Ricardo told him a service truck would be needed. It was never made clear to Michael what the store's scope of business would be.

[137] Second, duration is an essential term of a franchise agreement. Michael did not agree with Ricardo that the Franchise Agreement term should be five years. He wanted a three-year term. That strikes me as illogical, but it's not for the Court to determine that Michael should have preferred a five-year term. Thus, there was no consensus on term.

[138] Third, there was no consensus concerning the obligation to pay for leasehold improvements, a significant and essential term. Michael was steadfast that Peaceful Sky never agreed to pay the costs of the leasehold improvements. LSSI provided no budget (a vague text on May 15, 2017 is too uncertain and broad to constitute a budget), and LSSI did not seek payment until December 2017, after most expenses were incurred. That is when Michael learned that the agreements signed by Mr. Horning existed and were in Ricardo's possession.

[139] Viewed objectively, those were essential terms on which no consensus was reached. It is not necessary to find failure to reach consensus on all or dozens of terms for the doctrine of *consensus ad idem* to apply. A single essential term on which the parties do not agree is sufficient. The lack of consensus on the terms that I identify above are sufficient to establish that no *consensus ad idem* existed concerning the Franchise Agreement.

[140] Accordingly, no *consensus ad idem* existed concerning the Franchise Agreement.

[141] The Sublease and lease drafts that Ricardo provided to Michael on April 24, 2017, were never put into evidence. Thus, the Court received minimal evidence on the terms of those drafts. I heard evidence that the rent was increased to $7,500 in what Ricardo claims was the final lease, and he asserted that there were no other meaningful differences. However, his testimony offered no additional detail about the contents of those documents, and for the reasons I explain above I reject his evidence regarding their terms.

[142] Accordingly, I have no evidence about what LSSI proposed as its offer for the Sublease arrangement. Without the Sublease and Lease drafts that were provided to Michael – the very versions that would have formed the basis of agreement – I cannot determine what material terms, beyond the rent increase reflected in the later version,

were ever presented or explained to him.

[143] In any event, the Franchise Agreement and Sublease were inextricably tied. The franchise could not be operated without the Sublease and the Sublease was of no value without the Franchise Agreement. Even LSSI does not suggest Peaceful Sky would have entered into the Sublease without also having the Franchise Agreement in hand. Both documents were essential components of the contemplated business arrangement. I find that Peaceful Sky would not have committed to the Sublease in the absence of the Franchise Agreement. The business opportunity lay in the franchise – that was the point of the entire transaction. Although Michael did not expressly testify to this, I am satisfied, even given his limited engagement, that he understood it was pointless to agree to the Sublease without the Franchise Agreement. Both agreements were essential; one could not be made without the other.

[144] Accordingly, no *consensus ad idem* existed concerning the Sublease.

(d) Buster's and Bawitko

[145] Two cases in the franchise context provide additional support for my conclusions regarding *consensus ad idem*.

[146] In *1384334 Alberta Ltd. v Buster's Pizza Donair & Pasta Enterprises Ltd.*, 2020 ABQB 369 [*Buster's*], the Court held following a trial that no franchise agreement was made between the parties because they never reached a consensus on the essential terms. The franchisee had been shown the franchisor's standard form contracts. But it returned only one signed agreement, an agreement to sublease. Because the franchisor did not have signed agreements from the franchisee, it refused to execute the agreements. Despite having no signed agreements from the franchisor, the franchisee built and opened a restaurant that was designed as a Buster's restaurant. The franchisor did not prevent that and even attended the grand opening. The franchisee

paid the monthly rent but nothing under the franchise agreement despite being invoiced. After the restaurant had operated for over a year, the principal of the franchisor had the locks changed, which barred the franchisee's access.

[147] The Court held as follows concerning whether the parties had reached consensus on essential terms before the franchisee's restaurant opened:

> [51] I am not satisfied on a balance of probabilities that the parties reached consensus on the essential terms of an agreement before the restaurant opened. *This is not a case where the parties reached an oral agreement but for various reasons a written agreement was not prepared or signed. In this case, written agreements were prepared and sent to Fred and Sarah. Only some of the agreements were signed by Fred and none were signed by Alex.*
>
> [52] The written agreements Alex sent to Fred and Sarah in March 2008 contain the terms Alex was prepared to agree to. The parties agreed orally to include a right of first refusal for any future West End Buster's. The Agreement was amended to include the right of first refusal. Alex provided the amended Agreement to Fred and Sarah. Fred and Sarah signed only the Agreement and the Restrictive Covenant. *Despite requests from Alex, Fred and Sarah did not provide Alex with signed copies of the Remaining Documents*.
>
> [53] The Remaining Documents are not insignificant. They contain the payments required by 138 to Buster's, including the Fee and the Royalty Fees, and that Fred personally guarantee the performance of 138. The reasonable conclusion on the facts is that Fred did not sign the Remaining Documents because he was not willing to agree to the terms of those documents. Alex was not willing to accept the Agreement executed by Fred without agreement on the terms of the Remaining Documents.
>
> [54] While the Plaintiffs argue that the oral agreement reached was a franchise agreement, the Plaintiffs do not indicate what the terms were of the verbal franchise agreement that was reached.
>
> [55] I agree with the Ontario Court of Appeal's characterization of a franchise agreement in ***Bawitko*** [(1991), 79 DLR (4th) 97], at para 26:

> "*In my view, the terms of the franchise beyond those agreed to cannot be regarded as mere formalities or routine language. This is not a conventional document that requires only the filling in of blank spaces or the completion of minor details which the parties can impliedly be taken to have agreed upon. The terms of the draft clearly include material conditions essential to this kind of specialized contract. The very nature of the franchisor-franchisee relationship mandates that there be express agreement on the detailed provisions set up to regulate the business relationship of the parties. Here, taking the respondent's evidence at its highest, there was no meeting of the minds necessary for a completed contract...*"
>
> …
>
> [57] The onus is on the Plaintiffs to prove on a balance of probabilities that the parties reached consensus on the essential elements of an agreement. At a minimum the fees payable and the requirement for a personal guarantee are essential terms. I conclude that the parties did not reach agreement regarding these terms before the restaurant opened.
>
> [58] I also conclude that no agreement was reached regarding these terms after the restaurant opened and Alex returned from Lebanon.
>
> [Emphasis added]

(For context, Alex was the principal of the franchisor and Fred and Sarah were involved with the franchisee. The Remaining Documents were what the franchisee refused to sign. The evidence did not explain why the franchisor allowed the franchisee to operate for so long.)

[148] In *Bawitko Investments Ltd. v Kernels Popcorn Ltd.*, 1991 CanLII 2734, 79 DLR (4th) 97 (ONCA) [*Bawitko*], the parties agreed they would sign agreements to formalize the franchise arrangement but did not sign. The franchisor sued for breach of an agreement to enter into the franchise arrangement. The Court held that because there were essential terms on which agreement was not reached, and thus the parties were not

ad idem, no final agreement was reached.

[149] The passage from *Bawitko* excerpted in *Buster's* is of particular importance here. Franchise agreements are not like most agreements. They are not "conventional" documents where a few blanks can be filled in. "The very nature of the franchisor-franchisee relationship mandates that there be express agreement on the detailed provisions set up to regulate the business relationship of the parties.": *Bawitko* at p 16. Although *Bawitko* is factually distinguishable because the business here never operated as a franchise store and subsequent conduct did not support contract formation, its analysis nonetheless assists here. It reinforces that franchise agreements are specialized agreements requiring detailed provisions regulating the relationship and assists in understanding what must be established before *consensus ad idem* can be found to exist.

[150] It is difficult to imagine a franchise relationship operating entirely under oral agreements. That would inevitably result in "loosey-goosy" contract terms as Peaceful Sky suggests here. Moreover, an oral sublease would be vulnerable to application of the *Statute of Frauds*, 1677 (UK), 29 Cha II, c 3, though that law was not pleaded here, and the Sublease might survive due to part performance in any event.

[151] Another relevant factor arises from the franchise application dated April 26, 2017 (tab 10 of the Joint Book, Exhibit J-2). On the signature page, the following appears:

> The Applicant acknowledges and confirms that no franchise or other agreement shall be deemed to have arisen between the Applicant and the Franchisor (except as herein provided) by virtue only of the Applicant executing this Application or paying the deposit. Such agreement shall only arise upon the execution by the Applicant and the Franchisor of the Franchise Agreement.

Thus, LSSI expressly contracted that only a signed agreement would establish a

franchise relationship. Even without that provision I would have found that an oral franchise agreement was not made between the parties, but it nonetheless reinforces my conclusions.

(e) Conclusion on whether oral agreements were formed

[152] Because no *consensus ad idem* existed concerning the Franchise Agreement and Sublease, I find that no oral agreement was made concerning either agreement.

Issue 2(b): Did Michael and Peaceful Sky acquiesce to the terms of the Franchise Agreement and Sublease?

[153] LSSI argues that the Franchise Agreement and Sublease were made because Peaceful Sky acquiesced to them. That stance relies on Michael's failure to object to the written agreement drafts and the parties' post-June 20 conduct. For the following reasons, I conclude that no acquiescence occurred here.

[154] In some circumstances, silence or acquiescence can amount to acceptance of contract terms. The Court of Appeal addressed the point in *Curry v Athabasca Resources Inc.*, 2024 SKCA 7 [*Curry*]:

> [36] A valid contract is only formed when three criteria are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms are sufficiently certain (*Jans Estate v Jans*, 2020 SKCA 61 at para 34 [*Jans*]; citing *Matic v Waldner*, 2016 MBCA 60 at para 57, [2017] 1 WWR 504 (leave to appeal to SCC refused, 2017 CanLII 1341)). Determining whether a contract has been formed and, if it has, on what terms, calls for the application of an objective test. *In the absence of a written agreement, or some other clear and unequivocal communication respecting contractual terms, a court must determine whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer and,*

> *conversely, whether a reasonable person in the position of the latter would consider the former's conduct to have constituted an acceptance* (*Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp.*, 2020 SCC 29 at para 33, [2020] 3 SCR 247). *Where it is alleged that a party has agreed to a proposed contractual term through conduct – including through silence or acquiescence – rather than through express acceptance, such conduct must be sufficiently clear, unambiguous, or absolute to objectively demonstrate an intention to create binding legal relations on those terms* (*AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers Local 119*, 2022 SKCA 99 at para 49, [2023] 6 WWR 74).
>
> [Emphasis added]

[155] Ricardo testified as follows during examination-in-chief concerning the state of the relationship between LSSI and Peaceful Sky before he induced Mr. Horning to sign the Franchise Agreement and Sublease purportedly on behalf of Peaceful Sky:

> I still needed the signing to be done whether I was physically there or not. Extensively talking with Michael and team, I says, we gotta get this stuff done, I need this paperwork, I gotta continue with my side. At this point we had banks and everybody that knew we were going forward, we had purchased the building, had already started the construction, and we were in the thick of it. It was pretty active, and the way banks work, when you do a commercial loan, you put a percentage down on a commercial loan, and when you've expended those percentages, then you do a cash call to the banks, say ok, I've used my funds, I need yours, and that was the point where we were, and the bank says oh by the way, where's your lease, sublease and your franchise lease. It's coming, it's coming, said well, we can't release until this is done. I'm like guys, you're holding this up, this is ridiculous, like hurry up, what's going on? They have already committed, they were going forward, they were picking phone numbers, they were doing deposits, they were releasing funds, just do this. And so, Michael had agreed to this. He wasn't on site and I said to Lorne, I need some help. Someone's gotta sign this from your team that's involved. And he did.

[156] Of that testimony, I accept only that Ricardo needed very badly for

Michael to sign the Franchise Agreement and Sublease because he was out of money. I do not accept that Michael or Peaceful Sky had agreed or communicated agreement to the Lease and Sublease. To the contrary, I have already found that no such agreement had been reached or communicated. Although aspects of Michael's testimony were problematic, on this point I accept his evidence. His authorization to release the Deposit did not signify approval of those agreements, nor did his selection of a phone number. That was the sort of detail that Michael tended to focus on; to infer, but to conclude from it that he was ready to sign is to attach far too much significance to a trivial step.

[157] Perhaps Michael would have signed on June 20, 2017, if given the chance. However, Ricardo deprived him of the opportunity to make that decision by cancelling the scheduled meeting and inducing Mr. Horning to sign the agreements through the misrepresentation that Michael was fully in agreement and ready to sign. Ricardo's misrepresentation is relevant to any consideration of post-June 20 conduct because only LSSI, Ricardo and Mr. Horning knew that Mr. Horning had signed the agreements. Though Fan was present, she was unaware of what Mr. Horning signed. None of LSSI, Ricardo or Mr. Horning advised Michael or Fan of the signatures and Ricardo did not provide Michael with signed copies until December 2017. Accordingly, while the post-June 20 conduct of the parties suggests that each of Ricardo and Michael believed they had entered into agreements, Michael's conduct was influenced by Ricardo's wrongful conduct. I cannot know that Michael would have responded differently if he had been told of Mr. Horning's signings, but it is certainly possible.

[158] Even though the post-June 20 conduct was consistent with each of Ricardo and Michael believing that they had entered into agreements, the context is critical. Under *Curry*, I must assess whether Ricardo's belief that Michael intended to create binding contractual relations was objectively reasonable in light of the information available to him at the time.

[159] I find that Ricardo cannot have reasonably believed that Michael and Peaceful Sky intended to create binding relations.

[160] Ricardo induced Mr. Horning to sign the Franchise Agreement and Sublease without Michael's knowledge and did nothing to ensure that Michael was informed. Ricardo's actions did more than deprive Michael of the opportunity to be aware of the signings; he deliberately misrepresented to Mr. Horning that Michael had said he was ready to sign. He lied about that fact, motivated by his own desperation to get the mortgage finalized and advance the renovation project. In that light, Ricardo could not reasonably believe that Michael intended to create binding relations. He knew Michael had never expressed that intention and he knew his representation to Mr. Horning was false.

[161] Everything that Michael did thereafter must be viewed with the understanding that he did not know anything had been signed. On those facts, there was no acquiescence.

Conclusion concerning Issue #2

[162] I remain puzzled about why Michael proceeded post-June 20 as if he understood that Peaceful Sky was now the franchisee. Nonetheless, that cannot outweigh the simple fact that, on the essential terms, no *consensus ad idem* was reached on essential terms of the Franchise Agreement. LSSI does not argue that the Franchise Agreement and Sublease were made before June 20, 2017, nor does it suggest that they were made later, whether orally or in writing. I cannot conclude there was an agreement to agree before that date; even if there were, it would not bind Peaceful Sky nor diminish the requirement of consensus on all essential terms.

[163] Nor is there a basis to conclude that agreements were created through acquiescence. No other theory was advanced by LSSI as to contract formation.

Accordingly, I determine that no Franchise Agreement or Sublease was ever made between LSSI and Peaceful Sky.

Issue #3: Is there a liability exclusion clause in force?

[164] LSSI places heavy reliance on three contractual provisions that it says represents a "full answer" to Peaceful Sky's claims. They are comprised of the Notice to Reader provision in the proformas, the Entire Agreement clause in the Franchise Agreement signed by Mr. Horning, and the No Assurances or Obligations clause in the Confidentiality Agreement signed by LSSI and Peaceful Sky.

[165] For reasons that I explain below, I conclude that neither the Notice to Reader provisions in proformas nor the Entire Agreement clause in the Franchise Agreement offers LSSI any protection from liability. However, LSSI can rely on the No Assurances or Obligations clause in the Confidentiality Agreement to protect it from Peaceful Sky's claim herein.

(a) Notice to Reader provisions in proforma financial statements

[166] Each proforma financial statement contained the same Notice to Reader provision. I conclude that the Notice to Reader provisions do not operate to limit LSSI's liability for the simple reason that they do not purport to protect any party from liability other than HNG. As a result, they do not protect LSSI from liability. The point is straightforward, but I will explain briefly.

[167] The Notice to Reader provision is identical in each version of the proforma financial statements. It states as follows:

> NOTICE TO READER
>
> I have compiled the proforma statements of operations of the **Humboldt Lube Stop** for the first three years of operations

> using assumptions and other information provided by management.
>
> A compilation is limited to presenting, in the form of a financial projection, information provided by management and does not include evaluating the support for the assumptions, including the hypothesis, of other information underlying the projection. Accordingly, I do not express an opinion or any other form of assurance on the financial projection or assumptions, including the hypothesis. Further, since this financial projection is based on assumptions regarding future events, actual results will vary from the information presented even if the hypothesis occurs, and the variations may be material. I have no responsibility to update this communication for events and circumstances occurring after the date of this communication.
>
> Readers are cautioned that these statements may not be appropriate for their purposes.

[168] LSSI's name does not appear anywhere in any of the proformas. While the name Humboldt Lube Stop appears on every page, that is not a reference to LSSI. Instead, it referred to the store to be built in Humboldt. I located no Canadian authority suggesting that a Notice to Reader provision would benefit a franchisor in a similar position to LSSI, and it would be surprising if any such authority exists.

[169] None of the Notice to Reader language suggests that it was intended to protect LSSI from liability. It merely describes the limitations on what HNG did in preparing the proforma. If the language was meant to protect any party from liability, it would be HNG alone. It affords no protection to LSSI.

(b) Franchise Agreement

[170] I turn now to the Franchise Agreement. Above I found that no such agreement was made. Even if I had concluded that an oral franchise agreement existed, I would not give effect to the "Entire Agreement" clause. A party cannot rely on an "entire agreement" provision contained in an unsigned draft to avoid liability. Even if

the remaining provisions of the draft formed part of the oral agreement, the "Entire Agreement" clause itself cannot be enforced.

[171] The Court confronted a similar issue in *Homes of Distinction (2002) Inc. v Adili*, 2020 ONSC 5344, aff'd on other grounds in 2022 ONCA 64. That case involved a residential construction project where agreement drafts were exchanged but no written contract was finalized or signed, although the project proceeded. The Court held that the parties had entered into an oral agreement based on their agreement on essential terms and their intention to be bound. However, it declined to find that all terms of the exchanged draft formed part of that oral agreement. In particular, the Court stated regarding the unsigned draft's entire agreement clause:

> [104] As previously noted, the unsigned CHC [Custom Home Contract] included an "entire agreement" clause. The wording of such a provision in a written agreement may take various forms, but in general terms it seeks to limit the obligations between the parties to those set out in writing in the agreement. A written agreement was never finalized and signed in this case. Therefore, further consideration of this clause would serve no useful purpose.

[172] Even had I found the existence of an oral franchise agreement, I would not give effect to the "Entire Agreement" clause. The purpose of such a provision is to ensure that the contracting parties know what forms part of the agreement and (to the extent permitted by law) eliminate the potential for one party to contend that they relied on representations by the other party to induce them to make the agreement.

[173] It makes no sense to imply an "entire agreement" clause into an oral agreement. That would be entirely illogical, even if the parties later operated largely in accordance with an unsigned draft.

[174] Accordingly, the "Entire Agreement" clause in the Franchise Agreement offers no liability protection to LSSI.

(c) Confidentiality Agreement

[175] Having determined that LSSI is not protected by either the disclaimer language in the proformas or the Entire Agreement clause in the written Franchise Agreement signed by Mr. Horning, I turn to the Confidentiality Agreement dated April 26, 2017. Peaceful Sky does not dispute entering into that agreement. Clause 8 provides:

> 8. No Assurances or Obligations. Although the Company believes the Confidential Information is accurate, it makes no representations or warranties as to its accuracy, completeness or fairness, and neither shall have any liability for any express or implied representations or omissions in the Confidential Information. …

In this provision, LSSI is the "Company". The term "Confidential Information" is defined broadly – broad enough to capture essentially all information that LSSI and Ricardo provided to Peaceful Sky and Michael, including information furnished directly by HNG and Mr. Horning. The proformas fall within "forecasts", a term used in that definition.

[176] LSSI argues that, by entering into the Confidentiality Agreement containing the No Assurances or Obligations clause, Peaceful Sky agreed to exclude LSSI's liability for representations or warranties, and for express or implied representations or omissions contained in Confidential Information. I agree with LSSI.

[177] This issue is one of contractual interpretation governed by *Mosten Investments LP v The Manufacturers Life Insurance Co. (Manulife Financial)*, 2021 SKCA 36, and *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53. The principles from those cases apply here, though for the Confidentiality Agreement there is no dispute as to its terms.

[178] Neither party adduced evidence suggesting that, when they entered into the Confidentiality Agreement, they intended the No Assurances or Obligations clause to have anything but its ordinary meaning. Nor was there evidence, beyond the fact that this was to be a franchise context, to suggest that. The language is sufficiently clear to demonstrate the parties' intention to limit LSSI's liability. The clause is therefore properly interpreted as disclaiming LSSI's liability for misrepresentations or omissions. That does not end the analysis, as exclusion clauses may be overcome in appropriate circumstances; I address that issue below.

[179] I therefore find that the No Assurances or Obligations clause in the Confidentiality Agreement is available to shield LSSI from liability. I turn next to consider Peaceful Sky's argument that the No Assurances or Obligations clause does not protect LSSI because this case arises in the franchise context.

Issue #4: Does the franchise context operate to negate the availability of the "No Assurances or Obligations" clause contained in the Confidentiality Agreement?

[180] In the franchise context, exclusionary clauses such as entire agreement, independent investigation, or no-representation clauses will not necessarily shield a franchisor from liability.

[181] In particular, courts have declined to enforce such waiver provisions in three types of situations: where misrepresentations were made by the franchisor, where the franchisor breached its duty to act in good faith, and where unconscionability is made out.

(a) Unconscionability

[182] I will deal with unconscionability first. I determine that Peaceful Sky cannot overcome LSSI's reliance on the No Assurances or Obligations clause on the

basis of unconscionability because Peaceful Sky did not plead unconscionability nor its essential elements.

[183] The amended claim alleges that LSSI and Ricardo failed to deal with Peaceful Sky in good faith, and they took advantage of "Peaceful Sky and its shareholders and their collective lack of business acumen in operating a business in the Humboldt area", but that falls well short of a pleading of unconscionability. Unconscionability has two essential elements: an inequality of bargaining power that stems from some weakness or vulnerability affecting the claimant, and an improvident transaction. See *Uber Technologies Inc. v Heller*, 2020 SCC 16 at paras 62 to 65, cited by this Court in *Singer Enterprises Inc. v Parrish & Heimbecker, Limited*, 2022 SKKB 268 at para 41. Both inequality of bargaining power and improvident transaction must be pleaded. A tort need not necessarily be named if its elements are sufficiently pleaded.

[184] Although Peaceful Sky pleaded inequality of bargaining power, it did not plead or prove that this was an improvident transaction. It does not argue this was an unfair transaction from the start (in the sense of patently unreasonable terms having been imposed on Peaceful Sky); rather, Peaceful Sky complains primarily about the representations made by LSSI leading up to the transaction.

[185] I cannot conclude that Peaceful Sky has proven unconscionability such that it should be relieved of application of the No Assurances or Obligations clause when that was not part of the case that LSSI knew it had to meet.

[186] In exceptional circumstances, the Court may order amendments to pleadings even after the close of evidence in a trial, provided that the evidence led supports the pleadings as they would be amended. However, at that stage it should not be allowed unless the Court is satisfied that all the evidence possible on the new issue has been tendered: *Wagner v Saskatchewan Wheat Pool*, 2005 SKCA 153, citing *Assie v Saskatchewan Telecommunications*, 1978 CanLII 1811, [1978] 6 WWR 69 (SKCA).

[187] In preparing this judgment, I considered whether to invite the plaintiff to amend its pleadings but decided against that for the following reasons.

[188] First, prior to trial I engaged in many management calls with counsel. During that process I asked whether the parties had applications to make. Further, at the opening of the trial I asked if counsel had preliminary applications. At neither point did the plaintiff seek leave to amend, nor at any point during the trial. When the trial opened, I received two preliminary applications for video testimony (both consented to) and granted those orders. Thus, the plaintiff had ample opportunity to apply to amend its pleadings and chose not to.

[189] Second, during closing submissions, I specifically asked plaintiff counsel whether unconscionability was pleaded. It was not. Plaintiff counsel also expressly stated in closing submissions that they had made an intentional decision not to plead fraudulent misrepresentation (which I discuss below). Thus, pleadings were openly discussed during closing argument. Counsel made no request at that stage for leave to amend.

[190] Counsel were not rushed into closing argument; they had ample time to prepare. Closing argument occurred more than two months after the parties closed their cases (other than submission of a supplementary joint agreement as to facts to address certain details of their damages claims). I conclude that each side made the arguments and took the steps that they wished to. Moreover, the evidentiary portion of the trial was spread over several months. This was not a one-week trial that was over quickly.

[191] I conclude that counsel advanced the claims and tendered the evidence that they wished to put before the Court.

[192] Third, though I did not request submissions on the point, I conclude that the evidence at trial did not represent all the evidence possible concerning

unconscionability and fraudulent misrepresentation. In their trial brief and submissions, the defendants did not address fraudulent misrepresentation other than to argue orally that recklessness could not be equated to fraud. That may not be correct at law concerning civil fraud, but the fact that the defendants did not address fraudulent misrepresentation head-on in their arguments strongly suggests that the trial did not feature all possible evidence concerning that cause of action. Little evidence was led by either party to address unconscionability. I am satisfied that if unconscionability had been pleaded, much more evidence to address it would have been led.

[193] Because of those factors, I would not exercise my discretion to grant leave to amend and thus I consider it appropriate not to invite argument on whether the plaintiff should be permitted to do so. Accordingly, these disputes will be determined on the pleadings as they stood at the opening of the trial.

[194] Given that, I need not analyze whether unconscionability was proven or whether it would be capable of negating the No Assurances or Obligations clause. Because unconscionability was not pleaded, that doctrine cannot be relied on to override the liability waiver in that provision.

(b) Good faith

[195] Peaceful Sky contends that LSSI owed a duty of good faith because this case arises in the franchise context. It relies on *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35, [*Maple Leaf*] and *Shelanu Inc. v Print Three Franchising Corp.*, 2003 CanLII 52151, 64 OR (3d) 533 (ONCA) [*Shelanu*].

[196] For the following reasons, I am not satisfied that any duty of good faith arose here that would negate LSSI's reliance on the No Assurances or Obligations clause.

[197] Although the parties set out to enter into a franchise relationship, they did

not do so. That is a finding that Peaceful Sky specifically sought. It carries the consequence that there is no franchise agreement or franchise relationship. The good faith obligations discussed in *Maple Leaf* and *Shelanu* arose within contractual relationships.

[198] Accordingly, *Maple Leaf* and *Shelanu* do not apply here. I will explain further.

[199] First, in both *Maple Leaf* and *Shelanu* a franchise agreement was actually made. Where a contract exists, there may exist an obligation to carry out its terms in good faith: *Bhasin v Hrynew*, 2014 SCC 71. There is not, however, a recognized obligation (outside specific contexts such as labour relations) to *bargain* in good faith. See: *University of Regina v HTC Purenergy Inc.*, 2019 SKQB 126 at paras 171 to 175. While I am mindful of the discussion that follows paras. 171 to 175, Peaceful Sky did not establish the existence of any special relationship here. In any event, LSSI and Peaceful Sky never moved beyond negotiating the franchise relationship to make an agreement. Accordingly, good faith obligations did not arise between LSSI and Peaceful Sky.

[200] Second, even if I am wrong about that, *Maple Leaf* and *Shelanu* premised their discussions about the existence of a duty of good faith on the franchise agreements being contracts of adhesion. On the evidence before me, the Franchise Agreement was not a contract of adhesion, even if it had been finalized. Nor do I consider the Confidentiality Agreement to be a contract of adhesion.

[201] Contracts of adhesion do not arise from actual bargaining because they are presented on a "take it or leave it" basis by a party with substantially greater bargaining power, leaving no real room for negotiation by the weaker party. Courts have identified franchise agreements as an example of such contracts, including in *Maple Leaf* and *Shelanu*. Insurance contracts are another example: *Ledcor Construction*

Ltd. v Northbridge Indemnity Insurance Co., 2016 SCC 37.

[202] On the facts here, no contract of adhesion existed (including the Franchise Agreement, had it been completed). Although Michael testified that the agreements presented to him were "take it or leave it", the Court's assessment must be objective. LSSI was a very small franchisor with franchising experience nearly as limited as the prospective franchisee. Moreover, while Michael did little to try to negotiate the agreements, there is exactly one example where he pushed back on what Ricardo wanted – when Ricardo initially resisted releasing the Franchise Agreement form before receipt of the Deposit. Michael insisted on seeing the Franchise Agreement first, and within days Ricardo relented and provided agreement drafts to Michael, including the Franchise Agreement. Thus, *in the one example in the evidence where Michael refused to accept LSSI's position, LSSI conceded quickly*. Accordingly, there is no objective basis in the evidence to find that LSSI's agreements were contracts of adhesion in this case.

[203] Beyond that, nothing about the broader situation suggests the type of extreme power imbalance contemplated in *Maple Leaf* and *Shelanu*. LSSI was new to franchising and had never taken on the franchisor role for a new store.

[204] Finally, Ricardo testified that the Confidentiality Agreement was not drafted by a lawyer. He wrote it himself. Although it contains contract language one might expect in such a document and does not look amateurish, there is no basis to consider it contract of adhesion.

[205] Accordingly, I conclude that LSSI was not subject to a duty of good faith in the circumstances. No such duty existed that would preclude LSSI from relying on the No Assurances or Obligations clause.

(c) Misrepresentation

[206] Peaceful Sky argues that because LSSI made misrepresentations to induce it to enter the agreements, LSSI cannot rely on the No Assurances or Obligations clause contained in the Confidentiality Agreement to shield itself from liability. Below I determine that Peaceful Sky pleaded negligent misrepresentation, but not fraudulent misrepresentation. I therefore need not decide whether fraudulent misrepresentation would negate the No Assurances or Obligations clause contained in the Confidentiality Agreement because Peaceful Sky did not put that in issue. That leaves negligent misrepresentation. I find that the No Assurances or Obligations clause protects LSSI from liability for misrepresentations made negligently. In the following discussion I deal first with negligent misrepresentation and then address Peaceful Sky's failure to plead fraudulent misrepresentation.

[207] I note at the outset that, unlike the duty of good faith that arises only in the contract setting, misrepresentation can be advanced in contract and in tort. Because there is no Franchise Agreement, a contractual claim is not available here, but if the No Assurances or Obligations clause can be negated, it is possible for Peaceful Sky to sue LSSI in tort for misrepresentations.

[208] In *Roy v Thiessen*, 2005 SKCA 45 [*Roy*], which involved the sale of a home, the Court determined that an exclusion clause was sufficient to protect the defendant seller against a claim for negligent misrepresentation. The relevant portion of the clause, which read as follows, was reproduced at para. 8 of *Roy*:

> [8] … "It is agreed that there are no other representations, warranties, guarantees, promises or agreements other than those contained in this agreement and the Buyer hereby agrees to purchase the above property as it stands at the price and terms and subject to the conditions above set forth."

[209] At para. 20, *Roy* held that "a plain reading of the exclusion clause protects

the Thiessens against claims in both contract and negligent misrepresentation." (It remained possible to claim in *negligence* in *Roy*, but that is irrelevant here because Peaceful Sky has not pleaded negligence *simpliciter*, nor its elements.)

[210] Saskatchewan courts continue to follow *Roy*. See: *Smith v Hawryliw*, 2020 SKQB 169, *Ostapowich v Lacey*, 2019 SKQB 273, and *Forbes v Morrison*, 2014 SKQB 40.

[211] The No Assurances or Obligations clause offers protection similar to that provided by the clause in issue in *Roy*. I will reproduce it again here for convenience:

> 8. No Assurances or Obligations. Although the Company believes the Confidential Information is accurate, *it makes no representations or warranties as to its accuracy, completeness or fairness, and neither shall have any liability for any express or implied representations or omissions in the Confidential Information.* …

[212] Thus, Peaceful Sky agreed that LSSI would not be representing the accuracy, completeness or fairness of the Confidential Information, and further agreed that LSSI would have no liability for any express or implied representations or omissions in the Confidential Information. That language goes beyond that in *Roy* in that it both (a) disclaims reliance on accuracy of information that LSSI had provided or would provide, and (b) disclaims liability on LSSI's part for representations or omissions. In other words, it expressly mentions liability where the provision in *Roy* did not.

[213] Accordingly, the No Assurances or Obligations clause protects LSSI from a claim in negligent misrepresentation.

[214] It is at least possible that the No Assurances or Obligations clause would not negate a claim in fraudulent misrepresentation. Fraudulent misrepresentation is better able to overcome a liability disclaimer than is negligent misrepresentation. That

is both entirely logical – fraudulent misrepresentation being the more pronounced wrong – and supported by jurisprudence.

[215] The caselaw features several decisions where disclaimer provisions were negated by fraudulent misrepresentations. See: *Perfect Portions Holding Co. v New Futures Ltd.* (1995), 56 ACWS (3d) 499 (ONCJ); *Chung v Lite-Way Subs and Deli Inc.*, [2001] OTC 1019, 108 ACWS (3d) 467 (ONSC) and *Machias v Mr. Submarine Ltd.*, 2002 CanLII 49643, 24 BLR (3d) 228 [*Machias*].

[216] Caselaw concerning fraudulent misrepresentation does not assist Peaceful Sky, however, because it did not plead fraudulent misrepresentation in its amended claim. I discuss that above. Peaceful Sky's decision not to plead fraudulent misrepresentation appears to have been a deliberate choice.

[217] In its counterclaim, the plaintiff pleaded something approaching fraudulent misrepresentation. Paragraph 15 of the counterclaim states:

> 15. Such representations concerning the *pro forma* financial statements, the income, expense, and profit of the prospective Lube Stop Shop were reckless and negligent misrepresentations designed to induce Peaceful Sky into business with LSSI and Marcil.

[218] A counterclaim serves as an independent action: Rule 3-46(1) of *The King's Bench Rules*. A pleading in the counterclaim is thus independent of the pleadings in the main action, even where the matters are related. It would be inappropriate for the Court to simply rely on counterclaim pleadings to conclude that a cause of action has been pleaded in the main action.

[219] Accordingly, I determine that the plaintiff has not pleaded fraudulent misrepresentation in its amended claim.

[220] I therefore need not consider whether fraudulent misrepresentation is

capable of overcoming the No Assurances or Obligations clause.

[221] Returning to negligent misrepresentation, *Ismail v Treats Inc.*, 2004 NSSC 16 [*Ismail*], is a rare case where a court declined to enforce an exclusionary clause based on *negligent* misrepresentation. At para. 81, the Court stated:

> [81] Where the tort of misrepresentation is made out, exclusionary clauses will not be given effect. It would be inappropriate to allow a defendant to rely on misrepresentations to induce the formation of the contract, and then use the contract so formed to provide a legal excuse for those misrepresentations; see, for example, *Machias* at para. 107. Thus the exclusionary clauses do not exclude liability for the defendants.

[222] That finding was premised in part on the Court's determination that the franchise agreement was a contract of adhesion, such that the exclusion clause should be interpreted *contra proferentum* – liability for negligence would not be excluded unless it was specifically disclaimed: para. 78. I have already held that the Confidentiality Agreement was not a contract of adhesion. *Ismail* therefore does not assist Peaceful Sky.

[223] The No Assurances or Obligations clause is therefore enforceable to exclude LSSI's liability for misrepresentations.

(d) Reasonableness of reliance (if the clause did not apply)

[224] If I am mistaken about that conclusion, LSSI argues in the alternative that even if LSSI made false representations, Peaceful Sky did not reasonably rely on them because it made no effort to review the agreements or other materials presented by LSSI, nor carry out any due diligence. LSSI contends that reasonable reliance requires at least some effort by a claimant to read documents or obtain advice. Michael and Fan testified that they paid little attention to anything other than the numbers in the proformas. They made minimal effort to read the contracts. Michael did not read the

Notice to Reader in the proformas, nor did he take the Franchise Agreement or Sublease to a lawyer. He did not seek independent accounting advice.

[225] That position is inconsistent with the jurisprudence. Courts have held that when a party conducts extensive due diligence and/or relies on its own expertise, reliance on a representation may not be reasonable. But the converse is not true. A lack of investigation does not, on its own, render reliance unreasonable. As cases such as *TDL Group Ltd. v Zabco Holdings Inc.*, 2008 MBQB 239 at paras 233-237 and *Nutrilawn International Inc. v Stewart* (1999), 86 ACWS (3d) 516, 91 OTC 339 (Lexis) (ONCJ) establish, the reasonableness of reliance depends more on surrounding circumstances and the representor's conduct than on the level of diligence undertaken by the representee. For example, reliance may be unreasonable if surrounding circumstances point strongly to a different conclusion than advanced by the representor, or if the representor were known for making false or inaccurate representations.

[226] The evidence does not support a finding that Peaceful Sky's reliance on LSSI's representations was unreasonable.

(e) Summary and disposition

[227] For the reasons set out above, I find that the No Assurances or Obligations clause is enforceable to exclude LSSI's liability for misrepresentations. Had I found otherwise, I would have concluded that LSSI made numerous misrepresentations to induce Peaceful Sky to enter into a franchise relationship for which LSSI could have been held liable. Silence and omissions may amount to misrepresentations: *Machias* at para 121. Because the No Assurances or Obligations clause applies, I will not examine those misrepresentations in detail. However, I summarize them as follows:

(a) LSSI failed to disclose that this was LSSI's first time bringing on a franchisee inexperienced in the industry, and its first time setting up a new store as a franchise.

(b) LSSI failed to disclose that the store that LSSI planned to construct was fundamentally different, both from what LSSI had previously operated and from what was reflected in the proformas. The proformas were silent as to many lines of business that the franchisor ultimately proceeded with for the store, including heavy duty vehicles and agricultural vehicles. LSSI failed to inform Peaceful Sky that the franchisor had no prior experience and no internal revenue or expense data in the expanded lines of services, including mechanical services, heavy duty vehicles and agricultural vehicles, and only limited experience in tire sales, such that the Humboldt store's business model would entail increased risks that LSSI was unable to quantify. Not only did LSSI fail to disclose that it had no proof of concept of the business model, it failed to disclose that it did not develop the concept and it had no experience in supporting the extended business lines (which would be particularly attenuated if Lambert Stromberg was not hired as store manager).

(c) Although LSSI claims in this action for the cost of leasehold improvements, the proformas omitted any reference to such costs (capital or interest cost).

(d) Even though only a few months had passed since the proformas were shared, the rent charged under the sublease was set at $1,000 per month higher than in the proformas.

(e) Even though LSSI's plan was for the Humboldt store to offer mechanic services, the proformas did not include any amount for mechanic remuneration.

(f) Most of the tire sales were anticipated to be derived from the service

truck, which is relevant because Peaceful Sky did not understand the significance of the service truck to such revenues.

(g) LSSI essentially failed to inform Peaceful Sky of any risks. That includes the fact that LSSI was under financial strain itself, which would elevate the risks for any franchisee.

(h) LSSI had only limited experience in tire sales and other revenue figures from the extended business lines, resulting in the need to develop projections for such sales rather than having actual numbers from a Lube Stop to import, making those projections even more speculative. LSSI failed to disclose that.

[228] As I have found the No Assurances or Obligations clause enforceable, Peaceful Sky's claim for negligent misrepresentation must be dismissed.

Issue #5: Is LSSI liable to Peaceful Sky in conversion?

[229] The remainder of Peaceful Sky's claim is in conversion. That claim relates to the "hand back" of the Humboldt store to LSSI when Peaceful Sky decided not to continue to operate it. That claim is asserted against both LSSI and Ricardo, though here I will deal only with the claim against LSSI because I deal with Ricardo's personal liability in a separate section below.

[230] In their Second Amended Statement of Defence, LSSI and Ricardo plead that the Asset Purchase Formula contained in the Franchise Agreement bears on this issue. Because I conclude above that the parties never entered into the Franchise Agreement, that formula does not apply here.

(a) Relevant facts

[231] The Humboldt Lube Stop opened to the public on January 26, 2018. From

the outset, its revenues were much lower than projected by the proformas. In a text message on March 12, 2018, Michael said to Ricardo:

> … Humboldt lubestop was so slow after the grand opening, we are loosing [*sic*] money everyday, in the first week of March, someday only one car and average is around 5 to 6 cars, it's totally different from what you described 20 cars a day. February the total sale was only 15,000, we even can't cover the rent and staff salary. I don't know how long we can last for the business if it is still so slow.

[232] Revenues did not improve, and for the next several months most of Ricardo's text messages to Michael (other than small talk and pleasantries) focused on trying to get financial reporting and payments from Peaceful Sky. Only a few communications were exchanged between them from August 1, 2018 and December 1, 2018.

[233] On December 2, 2018, Ricardo wrote to Michael in a text message as follows:

> Good morning Michael
> I'm wanting to come to Saskatoon Tuesday to meet with you and fan.
> Michael to get all the facts regarding peaceful sky and its operations I am going to need the following please
> A professional monthly financial statement for each month since the start of the business
> Please
> I would like a summary of what you would need from me before this meeting also please
> Michael my brother is on his deathbed in Edmonton and I would like to try and get as much done as possible and soon as possible before you leave for Asia on the 10th please.
> My concerns are you guys leaving and what you want to do with your Humboldt business and its employees or responsibilities

[234] Michael responded that they could meet on the Tuesday as requested. Due to Ricardo's family situation, it does not appear that the parties met at all that week.

[235] On December 20, 2018, Ricardo texted to ask if Fan had gotten her "paperwork" done before she left for China, adding:

> …
> We can not continue too [*sic*] supply and pay for your oil purchases without payment
> You need to get your statement current before we can allow anymore to be shipped
> I'm sorry Michael you guys were supposed to have all this stuff done before your return to China
> …
> Michael if you want me to take all of this over it all needs to be current before we can step in
> …

[236] Michael responded by text the same day as follows:

> We are so sorry, boss. However, the money we have and may earn from the following week sales could only afford to pay employees incident bonus on Dec 24, and the last pay cheque on Dec 28 for them with Nick's last pay cheque on December 31. We have no more money to pay any supplier at this moment. Boss, if you can't help us with those suppliers, we shall inform all employees that our shop will close this month, the cut off would be Dec 26, but with Christmas off, we will put the date on Dec 24. Please advise are we gonna do this. Thank you with our apologies.

[237] That was the first time that Peaceful Sky advised LSSI of even a possibility that the Humboldt store would cease operations by December 31, 2018.

[238] On December 29, 2018, Ricardo asked Michael for access to the bank account in which revenues were deposited, a letter allowing him to take over utility payments, where payables stood with each supplier, whether payroll remittances were up to date for all employees, and a letter turning over the company so it could be operated by him. He advised Michael that Peaceful Sky would need to lay off all employees effective December 31, 2018 and pay out their holiday pay, and that "we

will take over the full operations and manage it effective January 1, 2019".

[239] In the same message, Ricardo continued: "I'm sorry this did not play out as planed [*sic*] we are very close to break even I will take this over hump relax Michael and Fan we will get this business into black ink and save all of our investments".

[240] In the Agreed Statement of Facts at Exhibit J-1, the parties agreed that:

(a) Peaceful Sky turned control of the Humboldt store over to LSSI on or about December 31, 2018. At the time, Peaceful Sky and LSSI were in discussion about LSSI purchasing Peaceful Sky's interest in the store.

(b) The value of the Humboldt store's inventory was $71,129.77 as at December 31, 2018.

(c) 102066631 Saskatchewan Ltd. [631 Sask] took over control and possession of the Humboldt store as of January 1, 2019. Ricardo owned and controlled 631 Sask.

[241] The value of leasehold improvements and equipment at the store at December 31, 2018 is a matter of dispute, but the Court received no expert evidence to value such assets.

[242] By January 13, 2019, much of the information requested by Ricardo had not been provided by Peaceful Sky to LSSI, although Peaceful Sky laid off the employees as of December 31, 2018.

[243] I find the foregoing as fact.

[244] Michael and Fan testified at trial that Ricardo promised to protect their investment. Michael further testified that it would be "our business" until the end of

2019. Michael and Fan wanted back every dollar that Peaceful Sky had invested into the Humboldt Lube Stop business. Fan testified that before they turned over the business to Ricardo, he promised to buy it back and that if she and Michael had known he would take the business for free, they would not have given it to him.

[245] Despite my general comfort with Fan's credibility, I do not believe that she was involved in direct discussions with Ricardo on that subject. Even if she was, her assertions about what she says Ricardo promised strain credulity to the extreme. I do not believe that Ricardo made the promises set out in the preceding paragraph.

[246] Ricardo testified that Michael and Fan failed to provide the responses he sought about their responsibilities to the business, and that they walked away and left him to pick up the pieces. Peaceful Sky had yet to provide financial reporting beyond what LSSI would receive daily from an app called ISI (which I briefly discuss below), so LSSI was unable to determine what the Humboldt store's payables were. All of that was affecting LSSI because it and its other stores ordered from the same suppliers that were owed money by Peaceful Sky.

[247] Ricardo further testified that it would never make sense for him to agree to what Michael wanted – to have LSSI pay Peaceful Sky an amount equal to its entire investment in the Humboldt store (including operating losses).

(b) Did the parties reach agreement on the terms of a hand back of the Humboldt store?

[248] I agree with LSSI that Michael's position made no sense, and I do not believe that Ricardo ever agreed to anything approaching that. For the following reasons, I conclude that he made no agreement regarding the hand back of the Humboldt store.

(a) Peaceful Sky's financial picture had deteriorated badly. Michael had

communicated that he was unable to bring in any further cash from China. On Michael's evidence, Peaceful Sky was bleeding cash monthly and could only barely make the end of December payroll. By taking over the business, LSSI would at least protect Peaceful Sky from severance claims and there could be some prospect of bringing the operating losses to an end. If Peaceful Sky became bankrupt, Michael likely would have no hope of recovering anything. Peaceful Sky thus had no leverage *vis-à-vis* LSSI in December 2018.

(b) By December 31, 2018, Ricardo had no information about the magnitude of Peaceful Sky's payables, which he had been demanding for months. Nor did he have a clear understanding of Peaceful Sky's losses to date. Even though he tried to offer hope that he could turn things around in Humboldt, he did not know the situation on the ground and would never have promised what Michael and Fan suggested.

(c) Late in her examination-in-chief (on the plaintiff's counterclaim, as her evidence was split), Fan testified not that Ricardo made specific promises; rather, she said that he promised to give them a buyback plan and then did not pay anything. Even if Ricardo promised to present them with a buyback plan, at best that would be an agreement to agree, and that cannot be enforced against him.

(d) If Ricardo made any such promises, they were not in writing. The closest that Ricardo came to promising that in writing was his December 29, 2018 assertion that "we will get this business into black ink and save all of our investments", which I consider puffery.

Ricardo was prone, as I have found elsewhere, to exaggerating his successes, the extent to which the Lube Stop brand and system was a "well-oiled machine", and to minimizing his responsibility for anything gone wrong. And he was inexperienced as a franchisor. But I do not believe for a moment that he made the promises in December 2018 that Michael and Fan suggest he made. What they say Ricardo promised is nothing short of fantastical.

(e) Indeed, Michael and Fan's evidence is directly contradicted by Peaceful Sky's own pleading at paragraph 32 of its amended statement of claim that Lube Stop "did not provide any notice to Peaceful Sky indicating that it would purchase any of the assets of Peaceful Sky used in the business of Lube Stop Humboldt". Peaceful Sky cannot assert the existence of an agreement when its pleadings say the opposite.

[249] In a situation where it was clear that Peaceful Sky had no better options than to let Ricardo try to operate Humboldt for at least a time, I find that Ricardo made no promises to Peaceful Sky that were capable of binding himself or any involved corporate entity and I specifically prefer Ricardo's testimony over that of Michael and Fan in relation to the turnover of the Humboldt store to LSSI. I find that no agreement was made between Peaceful Sky and LSSI regarding the terms by which LSSI took over the Humboldt store.

(c) Did conversion occur?

[250] Does what occurred at that time amount to conversion? The tort of conversion involves the following:

(a) a wrongful interference (such as taking, using or destroying);

(b) relating to the goods of another (in this case such goods would be equipment, leasehold improvements, and inventory); and

(c) in a manner inconsistent with the owner's right of possession.

See *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at paras 12-13.

[251] I conclude that conversion has been sufficiently pleaded.

[252] I accept that LSSI took over the Humboldt store, operating it through 631 Sask. Was that wrongful? That is a much more difficult conclusion to reach. As I find above, Ricardo and LSSI made no binding promises.

[253] Peaceful Sky *walked away*. It signed over the use of its assets (not necessarily all assets, but it transferred title to the half-ton service truck and signed over the rights to, and obligations for, utilities). Further, it is probable that Peaceful Sky ended up no worse off from LSSI taking over than if Peaceful Sky had simply shut the doors. In the latter circumstance, creditors would have wound up with the assets, or at least what was recovered from them.

[254] Peaceful Sky owed money to LSSI for inventory, so it is difficult to see how it was at all wrongful for LSSI to use inventory that was on hand. Peaceful Sky never paid anything for leasehold improvements, denying any obligation for that, so how can it be said that such improvements ever belonged to it, particularly where no sublease was ever made?

[255] It is inconsistent with Peaceful Sky's conduct to find LSSI's conduct as wrongful.

[256] Even if LSSI's conduct was wrongful, I would not award damages for

conversion of inventory or equipment for the reasons set forth above.

[257] All that leaves is equipment, the fate of which was never established in evidence. Nor was value established to my satisfaction. No expert evidence was filed concerning the value of equipment. Peaceful Sky pointed to book value of equipment (shown as $177,533 in Peaceful Sky's financial statements as at December 31, 2018, which Fan suggested be reduced to $170,884; the workup is set out at tab G of Exhibit P-42), but I am not persuaded that book value represents an accurate value. It was Peaceful Sky's onus to establish that value. Installed equipment is likely worth less than equipment that had not yet been installed. Once assembled, equipment and furnishings are likely worth substantially less. For example, at page G3 of Exhibit P-42 the invoice states that "Assembled items can not be returned". Had I determined that LSSI had engaged in wrongful conduct and converted Peaceful Sky's property, then I would have reduced that $170,884 by half as quantification of damages flowing to Peaceful Sky for conversion.

[258] However, I am not satisfied that LSSI is guilty of conversion for the reason that its conduct was not wrongful in the sense of the elements of conversion, so Peaceful Sky's claim under this head is dismissed in its entirety.

Issue #6: Is Ricardo liable in his personal capacity?

[259] Peaceful Sky argues that the Court should find that Ricardo is personally liable in connection with its claims for misrepresentation and conversion.

[260] In closing submissions, Peaceful Sky argued this as a claim to pierce the corporate veil. However, it was not pleaded as such. There is no pleading that Ricardo dominated the corporate entities, manipulated them for his personal benefit, set up a sham structure, shuffled assets between entities to protect them from seizure, used corporate entities as a shield for fraudulent or improper conduct, or anything similar.

[261] The pleadings must govern what claims are available to Peaceful Sky. Any claim to pierce the corporate veil must fail because of insufficient pleadings. Nor was there any meaningful evidence to establish the sorts of facts required before a court will pierce the corporate veil.

[262] Accordingly, the claims against Ricardo personally are not claims brought in conjunction with a request to pierce the corporate veil, even though argued as such by Peaceful Sky. Ricardo will be liable personally only to the extent that he acted in his personal capacity in committing a wrong. He was not the party to any contract in his personal capacity, so only tortious wrongs need be considered.

[263] In its trial brief, Peaceful Sky seems to get somewhat beyond its corporate veil argument when it states at paragraph 162 that because the Franchise Agreement was not signed, “Peaceful Sky had no contractual relationship with LSSI. Rather, its dealings were with Ricardo”.

[264] However, the Court received no evidence that, in dealing with Peaceful Sky on matters involving the prospective franchise or regarding the alleged conversion, Ricardo ever acted in his personal capacity. At no point did Michael or Fan testify that in any dealings with LSSI and Ricardo that they believed Ricardo was acting in his personal capacity, separate and apart from LSSI.

[265] Within three weeks after Ricardo and Michael first met, Michael was presented with the Confidentiality Agreement and the franchise application, both of which were signed by Michael on April 26, 2017. Both agreements showed LSSI as the franchisor. Peaceful Sky was fully aware that it was dealing with a corporate entity. No commitments were made by either party prior to April 26, 2017.

[266] Peaceful Sky has not identified a single event following April 26, 2017, where it says Ricardo acted in his personal capacity (as opposed to as a director or

officer of LSSI). It instead relies on generalities, particularly that Ricardo did not know what company was responsible for what, which led to confusion around invoicing. Confusion does not establish that he acted personally rather than as LSSI's director or officer. Confusion shows confusion, nothing more. It makes life more difficult in such a context, but nothing about that aspect of the parties' dealings leads to an inference that Ricardo acted in his personal capacity. Nor does Peaceful Sky's suggestion in its brief that Ricardo's actions and representations were motivated by personal profit. Most people who start or operate businesses are, or come to be, motivated by opportunities to earn profits.

[267] I decline to draw the inferences sought by Peaceful Sky. Instead, I conclude that Peaceful Sky has failed to establish that Ricardo was acting in his personal capacity in the business dealings with Peaceful Sky.

[268] Accordingly, the claims against Ricardo in his personal capacity are not proven and must be dismissed. In addition, as I find above, there was no pleading to breach the corporate veil, nor were facts pleaded that would go to the tests for doing so, so those efforts must also fail.

Conclusion regarding plaintiff's claims

[269] The plaintiff, Peaceful Sky, has failed in respect of all of the claims advanced in the amended claim. Accordingly, Peaceful Sky's claim is dismissed in its entirety.

G. ANALYSIS CONCERNING LSSI'S COUNTERCLAIM

[270] In its amended counterclaim [counterclaim], LSSI advances claims for the following:

(a) rent arrears arising from Peaceful Sky's breach of the Sublease, along

with arrears for utilities and certain building expenses;

(b) inventory arrears arising from Peaceful Sky's failure to pay for inventory while operating the Humboldt store;

(c) an amount owing for leasehold improvements and other amounts pertaining to the building;

(d) a claim for unpaid marketing and advertising expenses;

(e) a claim for operational system expenses; and

(f) training expenses incurred by Lube Stop.

Issue #7: Is Peaceful Sky liable to LSSI concerning rent arrears?

[271] I determine above that a sublease was never entered into by the parties. Notwithstanding that, Peaceful Sky paid rent for most of the period from when the store opened.

[272] All of the claims under this head (and others) represent a failure by counsel and the parties to cooperate in putting a workable set of documents and facts before the Court. Relative to the value of these disputes, a disproportionate amount of paper and trial time was dedicated to minor differences between the parties that they should have either resolved in some fashion or made much simpler for the Court. They did not, instead preferring to point at holes in one another's evidence in the manner of two ships crossing in the night. Truly reconciling their respective positions concerning damages is nigh impossible in several instances.

(a) Unpaid rents

[273] LSSI claims for $8,745.29 in unpaid rents. That amounts to a claim for January 2019 given the short notice provided by Peaceful Sky that it would cease

operating the store. LSSI characterizes this as arising mainly because of "the state of disarray Peaceful Sky left the Franchise in".

[274] There is no question that Peaceful Sky occupied and used the Humboldt store property, and understood it had to pay rent to LSSI, irrespective of whether there was a clear binding contract. Peaceful Sky argues generally that the written Franchise Agreement and Sublease that were not signed by it were replaced with a "loosey-goosy" arrangement.

[275] I conclude that Peaceful Sky used the Humboldt property under a month-to-month oral sublease with LSSI. Because there was no written sublease, no acceleration clause was agreed to. On such a leasehold arrangement, at least a month's notice of intent to vacate would be required. Because Peaceful Sky failed to give a month's notice, I conclude that rent would be owing for January 2019. There is no evidence of rent paid by 631 Sask for January 2019. The question is, which party bears the onus of proving what rent was paid by 631 Sask? A party asserting a claim bears the onus of proving failure to mitigate. LSSI mitigated in the sense that its related corporation occupied the property and operated the business.

[276] *The Landlord and Tenant Act*, RSS 1978, c L-6, does not contain a provision equivalent to s. 8(2) of *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, which reverses the onus to prove mitigation. Thus, the onus rests on Peaceful Sky, which has failed to establish what rent 631 Sask paid for January 2019.

[277] Peaceful Sky argues that it has no liability for unpaid rents because the invoices were rendered by 029 Sask rather than LSSI. It knew, however, that that was the arrangement. That is a highly technical argument that belies reality. I will not give effect to it. Peaceful Sky paid rent to LSSI for most of the relevant period. It understood it was obliged to do so. Had it not done so, LSSI would have acted much earlier to obtain redress. Peaceful Sky's argument fails.

[278] Finally, LSSI held a rent deposit of $7,500 from Peaceful Sky, which it acknowledges it was obliged to repay to Peaceful Sky if that was not exceeded by amounts owing to it by Peaceful Sky.

[279] The $8,745.29 includes a property tax payment of $828.85. It appears that GST was charged on the property tax, which seems wrong but can fairly be treated as *de minimus*. I determine that it is appropriate to set off the rent deposit against the $8,745.29, leaving a net amount of nothing owing, as even though Peaceful Sky failed to meet its onus concerning mitigation, I will allow something for that.

(b) Unpaid utilities

[280] LSSI also claims for arrears of utilities in the amount of $2,392.11. Peaceful Sky agrees at paragraph 208 of its trial brief that it owes this amount. LSSI shall have judgment for that sum of $2,392.11 for arrears of utilities.

(c) Building expenses

[281] LSSI claims for building expenses of $8,611.58. This relates to repair work on the building's heating system. LSSI points to provisions of the Lease and Sublease to found its claim, but those have no application here. I determine that absent an ability to claim under the "Operating Costs" provision contained in the Lease, LSSI failed to establish that Peaceful Sky was liable for these expenses. LSSI's claim for these building expenses is therefore dismissed.

Issue #8: Is Peaceful Sky liable to LSSI concerning arrears of payments for inventory?

[282] LSSI claims $68,878.68 under this head.

[283] The evidence on the billings for inventory was a chaotic mess. Each of Fan and Ms. Travis were adamant that they were right and the other was wrong.

Ms. Travis certainly contributed to the confusion with how she applied the opening $60,000 that Peaceful Sky paid to LSSI in January 2018.

[284] It also is clear that the ordering leading up to the store's opening was not handled well. There was no reason for the store to have an entire wall of brake parts, for example. Mr. Custance did the ordering (contrary to Peaceful Sky's argument that it was Ricardo), but it was Ricardo who trained him. LSSI bears some responsibility for the inappropriateness of the opening orders, and the beginning of 2018 was not so far in the rear-view mirror when the hand back occurred at the end of 2018 as to render this issue irrelevant.

[285] Further, while I do not view LSSI (or its related entity 631 Sask) as having converted the inventory that remained on January 1, 2019, it gained the benefit of it in operating the business thereafter. That business continues to operate in that location.

[286] I am not prepared to conclude that Peaceful Sky should be required to pay LSSI for inventory that was used in the continued operations of the business. I also generally prefer Fan's evidence over that of Ms. Travis. Fan was considerably more organized and detailed in her evidence and, other than rare exceptions, I generally found her to be a credible and reliable witness.

[287] Accordingly, this portion of LSSI's counterclaim is dismissed.

Issue #9: Is Peaceful Sky liable to LSSI concerning leasehold improvements and building expenses?

[288] LSSI claims $124,258.88 for unpaid leasehold improvements. Peaceful Sky understands the claim to be for $114,853.29, but that appears to be the result of categorizing LSSI's claims in a different manner (specifically, dealing with items (b) and (d) of paragraph 255 of LSSI's trial brief separately). For convenience I will deal with all of that in this section.

[289] To break down the numbers, tab 23 of the Joint Book (Exhibit J-2) is an invoice from 029 Sask to Peaceful Sky for $100,948.03 for "Change Order costs, Lube Stop Humboldt construction". Exhibit D-5 represents the detailed support for that invoice.

[290] LSSI's other claims in this category are as follows:

a. $3,062.69 for three other building invoices referenced at paragraph 255(d) of LSSI's trial brief;

b. $13,905.26 for invoices from Hergott Electric, which was to install equipment processors, claimed at paragraph 255(c) of LSSI's brief;

c. $5,547.39 for LSSI invoice #1455, relating to replacement of the furnace in January 2018; and

d. $6,342.90 for work done by Ace Plumbing.

[291] LSSI contends that Peaceful Sky directed the leasehold improvements work, as testified to by Ricardo and Ron Bresnahan.

[292] Mr. Bresnahan testified that he was present with Ricardo and Michael when the renovations were discussed, and that Michael "loved the ideas". However, Mr. Bresnahan was merely a construction labourer for the contractor, who also happened to be Ricardo's friend. He described himself as a "grunt" who just did what he was told. He had no knowledge of contractual relationships between LSSI and Peaceful Sky, nor did he recall who the contractor was on the project. He had an impression that it would not be Ricardo who paid for the work, but nothing more concrete, which is mere speculation and of no evidentiary value.

[293] While LSSI contends that Peaceful Sky directed all the work on the leasehold improvements, Mr. Bresnahan testified that Michael was happy to accept

what Ricardo suggested. I accept that Peaceful Sky was not objecting to the improvements proposed by Ricardo, and in fact was pleased with the concepts, but that is a far cry from Peaceful Sky directing the work.

[294] I begin with LSSI's claim for $100,948.03. I conclude for the following reasons that LSSI has failed to meet its onus to establish that Peaceful Sky is responsible to pay that amount.

[295] The lack of agreements is highly relevant here. It is the Franchise Agreement that makes the tenant liable for leasehold improvements, but I have ruled it unenforceable. Moreover, I determined above that one of the essential terms on which there was not agreement was responsibility for the cost of leasehold improvements.

[296] Is it appropriate to imply a term that Peaceful Sky as the subtenant should be held responsible for the cost of leasehold improvements? The Court's understanding is that that would be the normal allocation of costs in a commercial landlord and tenant arrangement, although the Court did not receive evidence on what the normal approach would be if there was no agreement to govern. Ricardo is the individual who is ultimately responsible for the fact that agreements were not signed so as to be enforceable against Peaceful Sky. On behalf of LSSI, he took the opportunity to negotiate that responsibility out of Peaceful Sky's hands and left the Court to determine that what existed was a month-to-month lease.

[297] LSSI bears the onus of proving that Peaceful Sky is responsible for the cost of the leaseholds. Beyond pointing to the non-existent Franchise Agreement, LSSI offers no legal basis for Peaceful Sky's liability.

[298] Further, the party that invoiced Peaceful Sky was 029 Sask. There is no evidence that LSSI ever paid 029 Sask, nor that 029 Sask ever assigned its claim for these amounts to LSSI. 029 Sask is not a party to this action. Although I dismissed

Peaceful Sky's argument above about what party issued invoices, that related to a small amount of monthly rent. This relates to over $100,000 in capital costs. Peaceful Sky and 029 Sask were never in a contractual relationship. In this context, it matters that there is no evidence that LSSI was out of pocket when *it* is the plaintiff by counterclaim. Moreover, LSSI's affiliate now operates the Humboldt store and thus benefits from those leasehold improvements.

[299] Accordingly, Peaceful Sky is not liable with respect to LSSI's claim for $100,948.03.

[300] I turn now to LSSI's claim for $3,062.69. At paragraph 239 of its trial brief, LSSI argues that a portion of that, $2,617.83, is owing by Peaceful Sky for the same reasons as Peaceful Sky is liable for the $100,948.03. LSSI offers no other basis for Peaceful Sky's liability. As I have determined that Peaceful Sky is not liable for the $100,948.03, I find that Peaceful Sky has no liability for the $2,617.83.

[301] The remaining $444.86 claimed is for the outstanding portion of an amount billed by Pumps & Pressures for the supply and installation of certain equipment (guns for oil, per Ms. Travis' evidence). It is represented by Invoice #1683, found at tab E of the attachments to the Supplemental Agreed Statement of Facts.

[302] Peaceful Sky contends that it is not responsible for the $444.86 because it returned a portion of the equipment (the DEF pump and perhaps others), which led to a reduction of the Pumps & Pressure invoice and a restocking fee. I do not see documentary evidence to corroborate, but Ms. Travis testified that LSSI paid the $444.86 when Peaceful Sky did not pay it, and that Peaceful Sky paid everything but that after accounting for the returned equipment. When questioned about this on November 28, 2024, Fan had little knowledge of this invoice (including the underlying Pumps & Pressure invoice). It appears that Peaceful Sky paid at least a portion of the original Pumps & Pressure invoice, which was invoiced to Peaceful Sky. Accordingly,

I determine that Peaceful Sky is responsible for the remaining $444.86.

[303] Next is LSSI's claim for $13,905.26 that originally was invoiced by Hergott Electric. The relevant documents are at Tabs 29 and 30 of the Joint Book (Exhibit J-2).

[304] I determine that Peaceful Sky is not liable for the claimed $13,905.26 because 029 Sask is the entity that invoiced Peaceful Sky, and it is not a party to this action. As above, there is no evidence that LSSI ever paid 029 Sask, nor that 029 Sask ever assigned its claim for these amounts to LSSI. LSSI's claim concerning the $13,905.26 is therefore dismissed.

[305] Next, LSSI claims $5,547.39 for its invoice #1455, relating to replacement of the furnace in January 2018. The original invoice was from Strueby Plumbing & Heating. It appears that no part of this was ever paid by Peaceful Sky. Because the Franchise Agreement and Sublease are not enforceable, I conclude that this claim must be determined on the same basis as the leasehold improvements, such that I find that LSSI has failed to satisfy its onus, and Peaceful Sky will not be liable for it.

[306] Finally, LSSI claims for $6,342.90 for invoices from Ace Plumbing. Ace Plumbing actually invoiced twice. Peaceful Sky made partial payments on those.

[307] Fan testified (in her second round of testimony, so it postdated that of Mr. Horning) that Mr. Horning negotiated a reduced payment with Ace Plumbing of $17,000. Mr. Horning did not testify on the point, so Fan's evidence is hearsay, and there is no evidence on the point on which the Court is prepared to rely. Peaceful Sky acknowledges that it paid the $17,000 to Ace Plumbing, so it must be taken to have accepted responsibility.

[308] Peaceful Sky's resistance to liability stems from its stance that LSSI negotiated a $17,000 compromised amount with Ace Plumbing, and the fact that Ace

Plumbing, LSSI and 029 Sask entered into a settlement agreement (Exhibit D-8) to compromise the amounts owing on this and another invoice. That occurred after Ace Plumbing obtained a default judgment for $23,874.79 in an action claiming for those invoices against LSSI and 029 Sask. That settlement was for $12,250. That action involved a claim for the two invoices in evidence as Exhibits D-7 ($13,806) and D-8 (outstanding balance to Ace Plumbing of $6,342.90).

[309] I accept that Peaceful Sky has responsibility for at least a portion of the amount owing concerning Ace Plumbing because it paid portions of those invoices. I have more difficulty with the notion that LSSI and 029 Sask should obtain all the benefit of any settlement with Ace Plumbing in respect of the two invoices. That seems inequitable. It appears to me that Ace Plumbing compromised its judgment by $11,624.79. I will allocate the benefit of that settlement approximately equally between LSSI and Peaceful Sky, such that Peaceful Sky's liability for the Ace Plumbing invoices shall be $3,100.

[310] Accordingly, I determine that under this heading overall, Peaceful Sky is liable to pay to LSSI the total of $444.86 and $3,100, being $3,544.86.

Issue #10: Is Peaceful Sky liable to LSSI for advertising and marketing expenses?

[311] LSSI claims $10,960.52 for unpaid advertising and marketing expenses. Its claim is founded on the terms of the Franchise Agreement, which is unenforceable. Having listened carefully to the evidence at trial on such expenses, it is clear that there was never a meeting of the minds as to what Peaceful Sky's obligations would be, and what it would get for what it paid.

[312] The lack of agreement can be attributed in large part to the parties never having entered a franchise agreement, which is mainly Ricardo's responsibility as I explain above. Even if they had entered the Franchise Agreement, its relevant

provisions leave much doubt as to what the franchisee was to receive for what it paid. As I interpret the evidence, LSSI billed what it thought it should be able to bill for without clearly linking it to Peaceful Sky's obligations under the Franchise Agreement.

[313] There never was an agreement concerning payment of these expenses. Even if there had been agreement, it is unclear to me that LSSI followed its own agreement. In those circumstances, I am unprepared to find that Peaceful Sky is liable. Accordingly, LSSI's claim concerning the $10,960.52 is dismissed.

Issue #11: Is Peaceful Sky liable to LSSI for operational system expenses?

[314] LSSI claims $6,205.08 for computer systems: Epicor, ISI and Dropbox. The relevant invoices are at tab D of the Supplemental Agreed Statement of Facts.

[315] Epicor enabled Peaceful Sky to pull up service information for a given vehicle. ISI enabled inventory ordering, tracked inventory on hand, and per-vehicle data. Ricardo described it as the largest and most complex system for operating oil change shops. It certainly was integral to LSSI's business model. Dropbox is known to be a cloud-based file sharing and storage application.

[316] Peaceful Sky argues that it is liable for none of this: they were not contemplated by the Franchise Agreement, which is not binding. The Epicor system is not for lube services but for the extended business lines that the Humboldt store never ended up providing, and the proformas did not contemplate such costs.

[317] I accept that ISI was a necessity to operate a Lube Stop store. With the lack of ongoing financial reporting by Peaceful Sky, LSSI would have had no financial data on what was happening at the Humboldt store and disputes would almost certainly have arisen between the parties much more quickly than they did.

[318] Peaceful Sky makes a facile argument about certain ISI invoices, at Bates

593-594 and Bates 732-733, saying they make no sense because the supporting invoices were from 2017. In fact, two ISI invoices (Bates 594 and Bates 733) are dated May 24, 2018 and November 23, 2018, respectively. The references to 2017 are to the same initial order date of September 14, 2017. It is difficult to understand how Peaceful Sky fails to understand the distinction between the initial order date and the invoice dates but perhaps it was not really trying. There is at least one other similar example.

[319] Accordingly, Peaceful Sky is liable for the invoices from LSSI relating to billings by ISI. Although it was a monthly licence, ISI billed in U.S. currency so the monthly cost would vary with the exchange rate. As well, LSSI did not bill for these on consistent intervals. The LSSI invoices to Peaceful Sky relating to ISI total $2,835.51.

[320] The Dropbox invoice at Bates 728 never mentions the Humboldt store. Nor does it appear to me that the evidence ever discussed why it was needed or what it was used for, if at all, in relation to Humboldt. I cannot find that LSSI has met its onus on this item.

[321] As I review my notes, I also see no discussion by Ricardo of the utility of Epicor. Ms. Travis averred to it, but I have no confidence that she understood what Peaceful Sky would need to run its operation. I cannot find that LSSI has met its onus on the Epicor invoices.

[322] Accordingly, I am not prepared to find Peaceful Sky liable for the Dropbox or Epicor invoices, but it is liable for the ones from ISI in the amount of $2,835.51.

Issue #12: Is Peaceful Sky liable to LSSI for training expenses?

[323] LSSI claims $51,200 for training expenses. I find that it has not established Peaceful Sky's liability for that amount.

[324] The Franchise Agreement provided that the franchisor was responsible to provide training at its cost, with the franchisee to be responsible for additional costs for "Additional start-up assistance or retraining courses".

[325] At no point did LSSI notify Peaceful Sky that it would be charging for any training.

[326] Ricardo invested considerable effort after the fact to try to capture the training he says he provided through review of his credit card statements and making estimates. He maintained no contemporaneous documentation to show what training he provided on any particular day. During the same time period, he was working intensively on setting up the store and overseeing the construction work. Accordingly, it is difficult to characterize the claims as being better than "guesstimates".

[327] LSSI also claims for Ricardo's meal, accommodation and travel expenses.

[328] Because no Franchise Agreement exists, I conclude that Peaceful Sky has no liability in respect of this claim. To be clear, however, even if the Franchise Agreement was validly made and fully enforceable, I would award nothing to LSSI on this front. There was no advance agreement on any of it. Ricardo became petulant when this action was served on LSSI and decided he would claim for training.

[329] LSSI's claim for training invoices is therefore dismissed in its entirety.

Conclusion regarding LSSI's Counterclaim

[330] LSSI shall have judgment for the sum of $2,392.11 for arrears of utilities, $3,544.86 for building expenses, and $2,835.51 for the ISI system. LSSI is therefore entitled to judgment on its counterclaim in the amount of $8,772.48. The rest of LSSI's counterclaim is dismissed.

H. CONCLUSION

[331] The claim of the plaintiff, Peaceful Sky, is dismissed in its entirety.

[332] The majority of the counterclaim of LSSI is dismissed. LSSI shall have judgment in the amount of $8,772.48 in respect of its counterclaim.

[333] Neither party has been entirely successful. Peaceful Sky succeeded in having the Franchise Agreement and Sublease determined unenforceable, but that did not result in judgment in its favour. The vast majority of LSSI's counterclaim was also dismissed.

[334] In the result, I conclude that neither party should have costs awarded in its favour. There shall be no costs payable by either party to the other.

J.
D.G. GERECKE